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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

NORTHROP CORPORATION AND MAX KILLINGSWORTH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the Attorney General does not have the right to prevent dismissal of a False Claims Act *qui tam* action brought on behalf of the United States, notwithstanding express statutory language stating that such an action "may be dismissed only if the [district] court and the Attorney General give written consent to the dismissal and their reasons for consenting." 31 U.S.C. 3730(b)(1).

2. Whether the court of appeals erred in refusing to allow the Attorney General to intervene to take over prosecution of a *qui tam* action brought on behalf of the United States, despite newly discovered evidence indicating that the extent of the fraud against the United States was substantially greater than had previously been supposed.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is unreported. The opinion of the district court (App., *infra*, 7a-9a) is unreported. An earlier opinion of the court of appeals (App., *infra*, 10a-30a) is reported at 25 F.3d 715. An earlier opinion of the district court (App., *infra*, 31a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1995. A petition for rehearing was denied on March 22, 1996. App., *infra*, 34a-35a. On June 11, 1996, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including July 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 3730 of Title 31, United States Code, is reproduced at App., *infra*, 36a-44a.

STATEMENT

1. The False Claims Act (FCA or Act) prohibits any person from "knowingly" presenting "a false or fraudulent claim for payment or approval" to the federal government. 31 U.S.C. 3729(a)(1). The Act also prohibits a variety of related deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(2)-(7). Any person who violates the Act is liable to the United States for treble damages and a civil penalty of up to $10,000 for each violation. 31 U.S.C. 3729(a).

The Act provides that the Attorney General of the United States "diligently shall investigate a violation" of the Act, and the Attorney General may bring a civil action if she finds that a person has committed a violation. 31 U.S.C. 3730(a). The Act also authorizes individual citizens (known as "relators") to bring private suits, commonly referred to as *qui tam* actions, to enforce the Act on behalf of the United States. 31 U.S.C. 3730(b)(1).[1] The statute provides

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[1] "Qui tam" is a shortened version of the Latin phrase "qui tam pro domino rege quam pro se imposo in hac parte

that a civil action filed by a *qui tam* relator "may be dismissed only if the [district] court and the Attorney General give written consent to the dismissal and their reasons for consenting." *Ibid.*

When a *qui tam* action is filed, the complaint is sealed and the government must be notified. The government may intervene in the suit "within 60 days after it receives both the complaint and the material evidence and information." 31 U.S.C. 3730(b)(2). If the government chooses to intervene, it has the primary responsibility for prosecuting the action and is not bound by any act of the relator. 31 U.S.C. 3730(c)(1). The relator remains a party to the action, but the government may dismiss or settle the action over his objection as long as the relator is provided with notice and the opportunity for a hearing before the district court. 31 U.S.C. 3730(c)(2). If the government elects not to proceed with the action, the relator "shall have the right to conduct the action" on behalf of the United States. 31 U.S.C. 3730(c)(3). The government can request to be served with copies of all pleadings, and "the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause." *Ibid.*

If a *qui tam* action results in a monetary recovery, the proceeds are divided between the government and the relator. In cases where the government does not intervene and the relator conducts the action, the

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sequitur," which means "who brings the action as well for the king as for himself." *United States ex rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 746 n.3 (9th Cir. 1993), cert. denied, 114 S. Ct. 1125 (1994).

relator receives between 25 and 30% of the proceeds of the action or settlement, while the United States receives the rest. 31 U.S.C. 3730(d)(2). If the government intervenes and prosecutes the action, the relator receives (subject to certain exceptions) between 15 and 25% of the proceeds. 31 U.S.C. 3730(d)(1).

2. Relator Max Killingsworth brought a *qui tam* action in November, 1988, alleging that defendant Northrop Corporation had submitted inflated cost estimates in connection with contract proposals for the MX missile system. In particular, Killingsworth alleged that Northrop had established "management reserves" prior to contract negotiations and had concealed the existence and extent of those reserves from government negotiators. See 94-56599 C.A. E.R. 6-7 (complaint). That practice violates the contractor's duty to provide the best estimate of the cost of performing the contract, and creates a presumption that the government is damaged dollar-for-dollar by the amount of the hidden management reserve. See *United States ex rel. Taxpayers Against Fraud* v. *Singer Co.*, 889 F.2d 1327, 1329, 1333 (4th Cir. 1989). The government informed Killingsworth's then-counsel that it would decline to exercise its statutory right to take over the action. See App., *infra*, 12a.[2]

Killingsworth subsequently obtained new counsel, who filed an amended complaint in September, 1991. The amended complaint expanded the scope of the

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[2] The Department of Justice subsequently explained to the district court that it had investigated the matter and concluded that there appeared to be some merit to Killingsworth's allegations, but that it had decided to pursue the issue in several other cases in which the fraud appeared to be more extensive. See 94-56599 C.A. Supp. E.R. 85-86 (Notice of Objection to Dismissal of Action).

litigation, specifying several additional contracts in the FCA claim. See 92-55863 C.A. E.R. 1-41 (amended complaint). The amended complaint also included a claim of wrongful discharge. See *id.* at 40. In December, 1991, Northrop informed the government of a proposed settlement negotiated between Northrop and Killingsworth. App., *infra*, 12a. Under that proposed agreement, Northrop would pay $1 million in settlement of the FCA claims (with Killingsworth's share of that sum to be determined by the district court), and $3.2 million in settlement of the wrongful discharge claim (which would not be shared with the government). *Ibid.*; see 94-56599 C.A. E.R. 64-65. The proposed settlement also provided that the FCA claim would be dismissed with prejudice as to Killingsworth and the United States, both of whom would release Northrop from any and all claims relating to the allegations set forth in the amended complaint. 94-56599 C.A. E.R. 65.

The United States objected to the proposed settlement, explaining that in its view an excessive sum had been allocated to Killingsworth's wrongful discharge claim. App., *infra*, 13a; see 94-56599 C.A. Supp. E.R. 81-98 (Notice of Objection to Dismissal of Action). Northrop and Killingsworth then altered the settlement to provide that $1.5 million would be allocated to the FCA claim, with the remaining $2.7 million being allocated to the wrongful discharge claim and to attorney's fees. App., *infra*, 13a. The government informed the parties and the district court that it did not consent to dismissal of the action. *Ibid.* The district court nevertheless entered an order of dismissal, explaining that in its view "the Attorney General's consent to dismissal is not required in the present circumstances." *Id.* at 33a.

3. The government appealed, relying on 31 U.S.C. 3730(b)(1), which provides that a *qui tam* action "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." The government argued that Section 3730(b)(1) gives the Attorney General the right to disapprove a dismissal based on settlement of a *qui tam* case even if the Justice Department has not moved to intervene.

The court of appeals reversed and remanded. App., *infra*, 10a-30a (*Killingsworth I*). The court rejected the government's contention that the consent of the Attorney General is a prerequisite to voluntary dismissal of a *qui tam* action. It held that the consent provision applies only during the initial 60-day period after a *qui tam* action is filed, when the United States possesses an unrestricted right (pursuant to 31 U.S.C. 3730(b)(2)) to take over the conduct of the litigation. App., *infra*, 24a. The court acknowledged that "[t]he language in the statute requiring both the government and the court to consent to a dismissal came from the initial *qui tam* statute of 1863," *id.* at 23a, and that "[u]nder the original statute enacted in 1863, the government had no right to take over an action commenced by a *qui tam* plaintiff," *id.* at 20a. The court concluded, however, that "[t]he format and intent of the amended statute * * * do not preserve the government's absolute right to bar a dismissal." *Id.* at 23a. It relied in part on 31 U.S.C. 3730(b)(4)(B), which gives the relator "the right to conduct the action" if the government declines to intervene at the outset of the case. The court asserted that the right to conduct the action "obviously includes the right to negotiate a settlement of that action." App., *infra*, 24a. The court also found support for its decision in

31 U.S.C. 3730(d)(2), which makes clear that a private person "settling [a] claim" under the False Claims Act is entitled to a monetary award. App., *infra*, 24a.

Finally, the court of appeals stated that "the government's assertion of an absolute right to block a settlement and dismissal by withholding its consent may represent a meaningless privilege in terms of present-day *qui tam* litigation." App., *infra*, 24a. The court explained that

> neither the government nor the relator desires to engage in further litigation. If the parties settle the action without a dismissal and thereby effectively stop litigating the case, the trial court would undoubtedly dismiss the suit for failure to prosecute. Conversely, the government may not force Killingsworth and Northrop to continue litigation by refusing to consent to a settlement.

Id. at 24a-25a (footnote and citation omitted).

The court of appeals therefore rejected the government's contention that it possessed a right to block the dismissal pursuant to settlement of a *qui tam* action. The court concluded, however, that "[t]he government, although it chooses not to fully intervene in the action, retains the right, upon a showing of good cause, to object to a proposed settlement." App., *infra*, 26a. The court recognized that the FCA contains no provisions for a hearing on that question, but noted that the Act "does cover the converse situation in which the government settles the action" and the relator objects to the settlement. *Ibid.* (citing 31 U.S.C. 3730(c)(2)(B)). The court of appeals "interpret[ed] the Act to provide a similar opportunity to the government; that is, when the government objects with good cause to a proposed settlement, it has a

right to a hearing, as would an objecting relator." App., *infra*, 29a-30a. Because the district court had not afforded the government any opportunity to press its objections to the proposed settlement, the court of appeals vacated the judgment of dismissal and remanded the case for a hearing "to determine whether the proposed settlement fairly and reasonably allocates the settlement funds." *Id.* at 30a.

4. On remand, Northrop moved to reaffirm the settlement. In 1993, however, during the pendency of the *Killingsworth I* appeal, Killingsworth had in discovery in a separate case obtained additional documents previously withheld by Northrop in this case. See 94-56599 C.A. E.R. 94 (Declaration of Dennis C. Egan). Killingsworth did not provide copies of those documents to government counsel until July 6, 1994—after Northrop had moved to reaffirm the settlement on remand. See *id.* at 75-76 (Declaration of Dennis C. Egan).[3] On July 22, 1994, the government opposed Northrop's motion to reaffirm the settlement, informing the district court of the new evidence and noting that the effect of the proposed agreement would be to dismiss with prejudice claims that the government had not fully investigated. See

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[3] The government's briefs in the Ninth Circuit stated that Killingsworth had briefly shown the new documents to an Assistant United States Attorney in 1993, while the appeal in *Killingsworth I* was pending. See 94-56599 Gov't C.A. Br. 5; 94-56599 Gov't C.A. Reply Br. 1, 9. The court of appeals alluded to that representation in *Killingsworth II*. See App., *infra*, 3a, 6a n.3. The Assistant United States Attorney has since informed us that our earlier statement was in error, and that he did not in fact see the new documents until July, 1994.

Government's Opposition to Northrop's Motion to Reaffirm Settlement at 5.[4]

At the outset of the hearing on Northrop's motion to reaffirm the settlement, government counsel informed the court that the government wished to intervene and take over the litigation. The government asked that its request for intervention be heard and decided before the court ruled on the pending Northrop motion to reaffirm the settlement. See 94-56599 C.A. E.R. 81 (transcript of proceedings). The district court declined, stating that it would first determine whether the government had good cause to object to the settlement. *Id.* at 84. At the conclusion of a brief hearing, the court announced that it would reaffirm the settlement. *Id.* at 91. The court subsequently entered an order reaffirming the settlement and dismissing the case with prejudice. App., *infra*, 7a-9a. The order made clear that the district court had declined to consider the new evidence proffered by the government, which had formed the basis of the government's desire to intervene and prosecute the case further. See *id.* at 8a.

5. The government appealed the dismissal, arguing that the district court had erred in refusing to consider its request to intervene and in refusing to consider the new evidence in deciding whether the settlement was reasonable. The court of appeals affirmed the district court's decision. App., *infra*, 1a-6a

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[4] When combined with the previously available evidence in this case, the government believes that the new documents show hidden management reserves by Northrop in 13 contracts potentially totaling $110.7 million—an amount far exceeding the prior claimed figures for management reserves. See 94-56599 C.A. E.R. 94-95 (Declaration of Dennis C. Egan).

(*Killingsworth II*). The court held that the mandate in *Killingsworth I* had required nothing more than a decision on "whether Killingsworth and Northrop colluded to shift the majority of the settlement funds to Killingsworth's personal claim and attorney's fees thereby depriving the government of its fair share" of the settlement proceeds, and that the district court had therefore properly refused to consider the new evidence before determining that the settlement was fair and reasonable. App., *infra*, 5a. The court also declined to address the government's motion to intervene to take over the litigation, stating that "[a]lthough the government initially raised its motion for intervention before the district court, the judge declined to address it. The government did not attempt to resurrect the motion at some later point in the remand hearing." *Id.* at 5a n.2.

REASONS FOR GRANTING THE PETITION

Qui tam relators play a valuable role in the detection and remediation of False Claims Act violations. *Qui tam* suits, however, are not intended to redress wrongs done to the relators themselves. Rather, a *qui tam* action furnishes a mechanism for addressing fraud *against the United States*. Although the FCA establishes financial incentives for relators to pursue *qui tam* litigation, the bulk of any monetary recovery goes to the United States. In light of the government's paramount stake in the ultimate disposition of *qui tam* litigation, it is essential that officials of the United States be given adequate means to protect the interests of the government and of the public. The False Claims Act provides such protection in its provision that a *qui tam* action "may be dismissed only if the [district] court and the Attorney General

give written consent to the dismissal." 31 U.S.C. 3730(b)(1).

The court of appeals' rulings in this case cannot be reconciled with the plain language of that provision, and they substantially impair the Attorney General's ability to protect the interests of the government and of the public when a *qui tam* relator and defendant—parties who have no obligation or incentive to protect the government's interests—settle and seek to dismiss a False Claims Act case brought on behalf of the United States. In *Killingsworth I*, the court held that the Attorney General does not have a right to prevent the voluntary dismissal of a *qui tam* action, notwithstanding the statute's clear directive that such an action may be dismissed only with the consent of the Attorney General. The court of appeals in *Killingsworth II* compounded the problem, foreclosing the government's attempt to intervene and prosecute this action on the basis of information obtained after the initial settlement was executed by the relator and the defendant. The combined effect of the court's rulings is to approve, over the Attorney General's objections, a $1.5 million settlement of claims for fraudulent practices against the United States when the government believes that the damage from those practices exceeded $110 million.

1. A. The False Claims Act authorizes a private person to bring an action "in the name of the Government" to seek civil remedies for fraud against the United States. 31 U.S.C. 3730(b)(1). Among the conditions placed upon the relator's right to bring suit on behalf of the United States is that a *qui tam* action "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." *Ibid.* The unambigu-

ous import of Section 3730(b)(1) is that the consent of the Attorney General is an essential prerequisite to the voluntary dismissal of a *qui tam* action pursuant to a settlement between the relator and the defendant.[5]

B. The unambiguous language of Section 3730(b)(1) ought to have ended the court of appeals' inquiry. In addition, however, the Attorney General's right to veto a proposed dismissal is vital to the proper operation of the unusual but carefully balanced system of *qui tam* litigation developed by Congress. The False Claims Act's *qui tam* provisions reflect Congress's recognition that the government lacks the resources necessary to uncover, investigate, and pursue every instance of fraud against the United States. See S. Rep. No. 345, 99th Cong., 2d Sess. 7-8

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[5] The court of appeals' departure from the statutory text is highlighted by its crafting of hearing procedures that have no basis in that text. The Act expressly provides for a hearing when the government, having intervened to take over a *qui tam* suit, proposes to settle the action over the relator's objection. See App., *infra*, 26a. The statute contains no analogous hearing provision covering the situation in which the government objects to a settlement negotiated by the relator. *Ibid.* The court nevertheless construed the Act to provide that "when the government objects with good cause to a proposed settlement, it has a right to a hearing, as would an objecting relator." *Id.* at 29a-30a. The court was correct in concluding that it would be anomalous to afford the government *fewer* procedural safeguards than the relator, since a *qui tam* suit is based on fraud against the United States. The court failed, however, to draw the obvious inference: no hearing procedures are necessary or appropriate where the government objects to the private parties' settlement, because the consent of the Attorney General is an essential prerequisite to dismissal of a *qui tam* action.

(1986) (*1986 Senate Report*). The Act gives private relators a financial incentive to supplement the government's investigative and enforcement efforts. The premise of the *qui tam* mechanism is that the relator's self-interested pursuit of personal financial gain will ultimately contribute to the detection and remediation of fraud against the United States.

Precisely because the relator may seek to vindicate his or her own interests, rather than those of the United States, it is essential that the Attorney General have the power to prevent settlements between relators and defendants that result in dismissals detrimental to the public interest. For example, *qui tam* suits are often joined with causes of action personal to the relator—here, for example, a claim of wrongful discharge. Because any recovery under the False Claims Act must be shared with the government, see pages 3-4, *supra*, it is in the relator's interest to negotiate an agreement that allocates as large a percentage of the settlement amount as possible to the personal claim. The defendant has no incentive to object to such a misallocation, although it may cause substantial financial harm to the United States. Self-interest may also affect the scope of the release proposed by the defendant in a *qui tam* settlement. It is in the defendant's interest to receive the broadest possible release of liability for fraud or other actions involving the United States. At the same time, the relator has no incentive to limit the scope of the release. As a result, *qui tam* relators often agree to release the defendant from liability, not only with respect to the particular instances of fraud at issue, but also with respect to all possible claims arising out of a large, multi-faceted government contract. When the dismissal order incorporates the settle-

ment agreement, the dismissal of a *qui tam* action will generally preclude a subsequent suit brought by the government upon claims that have been released.[6] The effect of such a release and dismissal is to immunize the contractor from liability for fraud that has neither been investigated nor actually litigated. In the present case, for example, new evidence of very substantially broader fraud emerged after the settlement had been negotiated between the relator and the defendant.

The court of appeals construed Section 3730(b)(1) as requiring the Attorney General's consent to dismissal only during the initial 60-day period after a *qui tam* suit is filed, during which the government (pursuant to 31 U.S.C. 3730(b)(2)) has an unrestricted right to intervene to take over the litigation. See App., *infra*, 24a. That interpretation renders the consent provision virtually meaningless. During the initial 60-day period, a *qui tam* case remains under seal, and not even the defendant is aware of its existence. See 31 U.S.C. 3730(b)(2). Thus, under the court of appeals' holding, the consent provision will never apply to settlements between the relator and defendant; it would apply only where the *qui tam* relator decides to dismiss the action voluntarily before the government has made a decision whether to intervene. In such a case, however, the government normally does not need a provision requiring its consent in order to protect its interests, since a voluntary dismissal made before service of the defendant's

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[6] See *1986 Senate Report* at 27 ("if the Government declines to intervene in a *qui tam* action, it is estopped from pursuing the same action administratively or in a separate judicial action").

answer is without prejudice. See Fed. R. Civ. P. 41(a)(1).

As the court of appeals acknowledged, moreover, "[t]he language in the statute requiring both the government and the court to consent to a dismissal came from the initial *qui tam* statute of 1863." App., *infra*, 23a; see Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. Under the 1863 Act, the Attorney General's power to reject a proposed settlement and dismissal of *qui tam* litigation could not have been limited to the 60-day period after filing, since the statutory provision permitting intervention by the government during that period was not added to the Act until 1943. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608. The court of appeals concluded that the 1986 amendments to the statute had implicitly narrowed the Attorney General's right of veto. See App., *infra*, 23a ("The format and intent of the amended statute * * * do not preserve the government's absolute right to bar a dismissal * * *."). That reasoning is contrary both to the established rule that repeals by implication are disfavored, see, *e.g.*, *Matsushita Electric Industrial Co.* v. *Epstein*, 116 S. Ct. 873, 881 (1996), and to the legislative history of the 1986 amendments, which indicates that Section 3730(b)(1) "remains unchanged," *1986 Senate Report* at 23.

In light of the potential divergence between the interests of the relator and those of the United States, Congress reasonably determined that the relator should not be permitted to settle and dismiss the government's claims without the consent of the Attorney General. Congress expressed that intent unequivocally, stating that a *qui tam* action "may be dismissed only if the [district] court and the Attorney General give written consent to the dismissal." 31

U.S.C. 3730(b)(1). The requirement that the Attorney General consent to any dismissal, moreover, is vital to the protection of the governmental and public interests in the correct resolution of claims involving fraud against the United States. The Ninth Circuit's decision disregards the plain language of Section 3730(b)(1) and disrupts the operation of the *qui tam* system.

C. Contrary to the court of appeals' conclusion, other provisions of the False Claims Act do not cast doubt on the plain meaning of Section 3730(b)(1). The court of appeals found the government's asserted power to veto a False Claims Act settlement to be "contradictory to the express language of [31 U.S.C.] § 3730(b)(4)(B), which gives the *qui tam* plaintiff 'the right to conduct the action.'" App., *infra*, 24a. There is, however, no basis for the court's assertion that "[t]he right to conduct a *qui tam* action obviously includes the right to negotiate a settlement in that action." *Ibid.* Rather, the relator's right to "conduct the action" is subject to the limitations set forth in other provisions of the statute, including Section 3730(b)(1)'s statement that the action can be dismissed only with the consent of the Attorney General. The court also erred in relying (see App., *infra*, 24a) upon 31 U.S.C. 3730(d)(2), which provides that, if the government does not intervene in a *qui tam* action, "the person bringing the action or settling the claim" shall receive a specified percentage of the United States' recovery. See pages 3-4, *supra*. Section 3730(d), entitled "Award to Qui Tam Plaintiff," establishes the percentage of the total award to which the relator is entitled. It makes clear that the relator is entitled to the same percentage whether the case is settled or proceeds to a final judgment on the merits.

Nothing in that Section, however, purports to override Section 3730(b)(1)'s clear provision that the consent of the Attorney General is a necessary prerequisite to settlements that result in dismissal.

The court in *Killingsworth I* also suggested that the Attorney General's assertion of a veto power over a proposed dismissal represented an attempt to force the relator and the defendant to continue the litigation against their will. App., *infra*, 24a-25a. That concern is illusory. As a practical matter, the Attorney General's right to disapprove a settlement will not force the parties to litigate against their will if the government declines to intervene and prosecute the action. Both the relator (for financial reasons) and the defendant (to obtain a dismissal with prejudice) retain substantial incentives to revise the settlement to address the Attorney General's concerns. Because the United States will receive a large majority of any False Claims Act recovery, the Attorney General has no interest in rejecting a reasonable settlement and allowing a case to languish. It is therefore in the interests of the relator, the defendant, and the Attorney General to revise a proposed unacceptable settlement and craft a new one.

Even under the court of appeals' theory, moreover, the settlement of a *qui tam* action may not be approved if the district court finds that the Attorney General's objections have merit or that the settlement is otherwise improper. See App., *infra*, 29a-30a. Thus, the court of appeals' approach does not eliminate the possibility that the lawsuit will continue despite the parties' desire to settle it, nor does it obviate the need for approval of the agreement by someone other than the relator and defendant. The question is simply whether the settling parties must

obtain the consent of both the district court and the Attorney General, or of the district court alone. The requirement that the consent of both the court and the United States be obtained is clear from the text of the statute. 31 U.S.C. 3730(b)(1).[7]

2. The problems created by the Ninth Circuit's holding in *Killingsworth I* were compounded by the court's decision in *Killingsworth II*. The court in *Killingsworth I* held that the Attorney General has two options when faced with a settlement that is against the interest of the United States: (1) attempt to intervene for "good cause" under 31 U.S.C. 3730(c)(2)(D)(3), or (2) raise objections to the settlement at a hearing. See App., *infra*, 28a. On remand, the government sought to exercise the first option by intervening in order to prosecute the action in light of new evidence of what now appears to have been

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[7] The Second Circuit has stated that once the United States has declined to intervene in an action, "little rationale remains for requiring consent of the Attorney General before an action may be dismissed." *Minotti* v. *Lensink*, 895 F.2d 100, 104 (1990). *Minotti* involved an *involuntary* dismissal by a district court rather than a voluntary dismissal by the relator. The court in that case did not hold that the consent provision applies only during the initial 60-day intervention period, but that the consent provision applies "only in cases where a plaintiff seeks voluntary dismissal of a claim or action brought under the False Claims Act, and not where the court orders dismissal." *Id.* at 103; see *United States ex rel. McGough* v. *Covington Technologies*, 967 F.2d 1391, 1397 (9th Cir. 1992) (distinguishing *Minotti*). Where a court dismisses a *qui tam* action on the merits, we agree that Congress did not intend to require the Attorney General's consent. Where the relator attempts to dismiss the case voluntarily, however, Congress concluded that the Attorney General's consent is necessary to protect the interests of the United States.

extensive fraud, and the broad release in the parties' agreement that would otherwise prevent the future use of that evidence. The government also relied on that evidence in arguing that a settlement of $1.5 million on the FCA count was seriously inadequate. The district court refused to consider the intervention request and reaffirmed the settlement, holding that new evidence provides no basis for disapproving a settlement entered into by the relator and the defendant. *Id.* at 8a. The court of appeals affirmed that decision, leaving intact the district court's holding that the reasonableness of the settlement depends solely on the evidence existing when the agreement was executed, rendering newly discovered evidence irrelevant.

The disposition of *Killingsworth II* reflects a fundamental error. The False Claims Act gives the United States the right to intervene *at any time* "upon a showing of good cause." 31 U.S.C. 3730(c)(3). The discovery of new evidence of fraud is precisely the type of situation that Congress intended to constitute "good cause." *1986 Senate Report* at 26-27. The effect of the *Killingsworth II* holding is to limit the government to the discovery conducted by the relator up to the point of a settlement proposal—even if the relator's efforts were inadequate or the defendant improperly withheld evidence during discovery. Because the government often does not have an opportunity to evaluate the evidence until it is asked to review a proposed settlement, that holding, coupled with the holding that the government has no right to veto a settlement, will severely interfere with the

government's efforts to prevent improper settlements in *qui tam* cases.[8]

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[8] The court of appeals erred in holding (App., *infra*, 5a n.2) that the government's request to intervene was not properly before the district court. The court acknowledged that the government had sought to intervene early in the hearing and that the district court had declined to address that request. Because the government "did not attempt to resurrect the motion at some later point in the remand hearing," the panel reasoned, that motion was never properly before the district court. *Ibid.*

The court's reasoning is unpersuasive. Having made an intervention request and been told in no uncertain terms by the district court that that request would not be considered, the government was under no obligation to "resurrect" the motion. Indeed, the orderly conduct of district court litigation would be substantially impaired if parties were encouraged or required repeatedly to raise already-rejected arguments. In any event, the government did make clear that it had not abandoned the intervention request. Government counsel reiterated, near the end of the hearing, that the Department of Justice wished to take over the litigation, see 94-56599 C.A. E.R. 88, 89 (transcript of proceedings), and the government filed a written motion to intervene after the hearing was concluded but before judgment was entered. See App., *infra*, 5a n.2.

The court of appeals was also incorrect in criticizing the government for failing to conduct discovery in 1993, when Killingsworth first obtained the new evidence. See App., *infra*, 6a n.3. The court based its criticism on its understanding that the government "was aware of the alleged new evidence since 1993." *Ibid.* That statement was based on the government's representation that Killingsworth had briefly shown some of the pertinent documents to an Assistant United States Attorney in 1993, during the pendency of the *Killingsworth I* appeal. See note 3, *supra*. As noted above, see note 3, *supra*, the Assistant United States Attorney has since informed us that he did not see the documents in question until July, 1994. Even if our earlier representation is taken as true, however, there is no basis for the court's suggestion that the government

3. The Ninth Circuit panel in the instant case was the first court of appeals to address the question whether the Attorney General possesses a right to prevent the voluntary dismissal of a *qui tam* action brought under the FCA. No circuit conflict exists on the issue. This Court's review is warranted, however, even in the absence of a conflict among the circuits.

A. Department of Justice records show that 1386 *qui tam* cases have been filed since the 1986 amendments to the False Claims Act. Of those, 458—approximately 33%—were filed within the Ninth Circuit. Because many major defense contractors are located within the Ninth Circuit, moreover, a disproportionate percentage of the larger *qui tam* cases are also brought there. By depriving the Attorney General of the right to prevent unreasonable *qui tam* settlements, the court of appeals' rulings in this case will have an immediate and serious impact on a large portion of existing and future *qui tam* litigation.

B. The government's ability effectively to monitor *qui tam* litigation in a manner that safeguards the public interest depends on the existence of clear legal rules delineating the scope of the Attorney General's authority. The answer to the question whether the Attorney General has the right to veto a *qui tam*

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failed to seek discovery in a timely fashion. The government could not have conducted formal discovery at a time when the case had been dismissed with prejudice and was pending on appeal in the Ninth Circuit. The case was remanded to the district court in June, 1994, and the United States received copies of the documents the following month. Government counsel promptly investigated the matter anew, informing the district court in August, 1994, that the Department of Justice wished to take over the litigation.

dismissal provides one of the basic ground rules under which the *qui tam* system operates. The doubts about the scope of the Attorney General's power created by the decision below will substantially complicate the process of negotiation and settlement of *qui tam* cases nationwide.

If the Attorney General does *not* possess a veto power, moreover, she must devise alternative mechanisms for addressing the danger that settlements between private parties will deprive the government of an adequate recovery in cases of fraud against the United States. If the decision below is correct, the Attorney General will be required to protect the government's interests by intervening in an increased number of cases. Such intervention requires a substantial expenditure of government resources. Prompt resolution of the issue by this Court will greatly assist the Attorney General in determining when intervention will be necessary in order adequately to protect the public interest in preventing collusive or otherwise inadequate settlement agreements.

C. Finally, the combined effect of the two Ninth Circuit rulings in this case is to threaten to immunize a very substantial degree of fraud from False Claims Act litigation. Despite newly discovered evidence showing potential fraud in this case in excess of $110 million, the district court and the court of appeals have upheld a False Claims Act settlement of only $1.5 million. The settlement and dismissal in this case plainly disserve the interests of the people of the United States and the purposes of the False Claims Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1996

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-56599
D.C. No. CV-88-6635-TJH

UNITED STATES OF AMERICA, EX REL.
MAX KILLINGSWORTH, PLAINTIFF-APPELLANT

vs.

NORTHROP CORPORATION,
DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA
TERRY J. HATTER JR., District Judge, Presiding

Submitted October 17, 1995 *
Pasadena, California

[Filed October 26, 1995]

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* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. 34(a); 9th Cir. R. 34-4.

MEMORANDUM**

Before: POOLE and O'SCANNLAIN, Circuit Judges, and MARQUEZ,*** District Judge

This case is before this court for a second time. Following the first appeal, we remanded this case to the district court for a finding regarding the fairness and reasonableness of the proposed settlement. *United States ex rel. Killingsworth* v. *Northrop Corp.*, 25 F.3d 715, 723 (9th Cir. 1994) (*Killingsworth I*). The government contends that on remand the district court erred by: (1) refusing to consider newly discovered evidence which allegedly undermines the fairness of the proposed settlement; and (2) failing to hold an evidentiary hearing. Whether the district court complied with our remand mandate is a question of law which we review de novo. *See, e.g.*, *United States* v. *McConney*, 728 F.2d 1195, 1202 (9th Cir.) (en banc) (questions of law reviewed de novo), *cert. denied*, 469 U.S. 824 (1984). We affirm.[1]

In the first appeal, the government contended that, despite its refusal to previously intervene in the action, it had an absolute right under the False Claims Act, 31 U.S.C. § 3730 (FCA), to block the proposed settlement between Killingsworth and Northrop. *See*

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

*** The Honorable Alfredo C. Marquez, Senior United States District Judge for the District of Arizona, sitting by designation.

[1] We need not repeat the underlying facts which are set forth in *Killingsworth I*.

Killingsworth I, 25 F.3d at 720. The government argued that the proposed settlement—$1.5 million for the FCA claim and $2.7 million to Killingsworth for his wrongful termination claim and attorneys' fees—reflected a deliberate attempt by Killingsworth and Northrop to allocate the funds in such a manner to deprive the government of its fair share. *See id.*

We rejected the government's contention that it had an absolute right to block the settlement. *See id.* at 723. Nevertheless, we concluded that, "when the government objects with good cause to a proposed settlement, it has a right to a hearing, as would any objecting relator . . . ." *See id.* at 725. In June 1994, our mandate issued and we remanded the case to the district court with the following instruction:

> [T]he district court should hold a hearing to determine whether the proposed settlement fairly and reasonably allocates the settlement funds. If the district court approves the settlement, it may dismiss the case. On the other hand, if the district court finds that the amount to be paid to Killingsworth and his counsel is not a fair appraisal of the value of his case and services rendered by his counsel, it may disapprove the settlement as structured. In the latter instance, the parties are entitled to continue with litigation.

Id. at 725.

During the pendency of the first appeal in 1993, Killingsworth allegedly obtained access to additional Northrop documents which indicated more extensive fraud by Northrop than originally determined. Killingsworth provided copies of the new documents to an Assistant United States Attorney in 1993.

Subsequently, Northrop filed a motion to reaffirm the settlement. Arguing that the amount of the settlement for the FCA claim was inadequate based upon the newly discovered evidence, the government filed an opposition to Northrop's motion. Killingsworth sent copies of the new evidence to the Justice Department in July 1994.

At the remand hearing on August 22, 1994, the government requested a continuance to file a motion to intervene and to litigate the matter based upon the alleged newly discovered evidence showing more extensive fraud than contemplated by the proposed settlement. The government argued that the court should address the motion to intervene before determining the reasonableness of the settlement. The government also represented that it would consent to the settlement if the dismissal of the action was without prejudice to the government.

The court rejected the government's argument because it believed that, based upon our remand order, the government first had to show good cause for objecting to the settlement before being allowed to intervene and to litigate further the matter. The court then denied the government's continuance motion and gave the parties an opportunity to address the reasonableness of the settlement. Following the parties' arguments, the court made the following ruling:

> [H]aving read the government's papers and now having had a hearing as instructed by the Ninth Circuit, [I'm] going to reaffirm that settlement agreement . . . . You know, in settlements not everybody is happy. Usually no one, if it's a successful settlement, ought to be completely happy,

> but indeed satisfied. And that is the case here. Anything can occur afterwards, all kinds of evidence can come out. That's one of the purposes of having a settlement, to indeed keep us from having to go through a lengthy further discovery, trial itself, other kinds of matters. So I'm going to reaffirm the settlement agreement . . . .

On September 9, 1994, the district court entered a written order reaffirming the settlement and dismissing the case with prejudice.[2]

We hold that the court properly determined the reasonableness and fairness of the proposed settlement. Our mandate merely required the district court to hold a hearing on whether the government's objections to the proposed settlement rested on good cause—i.e., whether Killingsworth and Northrop colluded to shift the majority of the settlement funds to Killingsworth's personal claim and attorney's fees-thereby depriving the government of its fair share. Nothing more was required.

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[2] On August 24, 1994, the government attempted to file a motion to intervene which the clerk's office for the Central District of California refused to accept based upon the district court's reaffirmance of the settlement. The government argues that the clerk's return of the motion is tantamount to a denial of the motion, and, therefore, appealable. We reject this argument as nonsensical. Although the government initially raised its motion for intervention before the district court, the judge declined to address it. The government did not attempt to resurrect the motion at some later point in the remand hearing. The motion therefore was never properly before the district court and we decline to address it for the first time on appeal. *See e.g., Sablan* v. *Dept. of Fin. of N. Mariana Islands*, 856 F.2d 1317, 1327 (9th Cir. 1988). Accordingly, we deny as moot Northrop's motion for partial dismissal of appeal.

On remand, however, the government sought to introduce new evidence allegedly undermining the fairness of the proposed settlement. The district court did not err by refusing to consider the alleged new evidence relating to other issues before determining whether the government had good cause for objecting to the proposed settlement in light of our limited remand. *See Killingsworth I*, 25 F.3d at 725. No language in our remand order required the district court to hear new evidence at an *evidentiary* hearing. *See id.* Having reviewed the parties' briefs and entertained arguments, the court properly followed our remand order.[3]

AFFIRMED.

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[3] We reject the government's contention that the district court abused its discretion by reaffirming the settlement without allowing additional time for discovery. The government concedes that it was aware of the alleged new evidence since 1993; thus, the government failed to conduct discovery between its receipt of such evidence in 1993 and the court's dismissal of the action in August 1994. Under such circumstances, the court properly refused the government's eleventh-hour discovery request. *See, e.g., Sopcak* v. *Northern Mountain Helicopter Service*, 52 F.3d 817, 819 (9th Cir. 1995).

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 88-6635 TJH (Ex)

UNITED STATES, EX REL.
MAX KILLINGSWORTH, PLAINTIFFS

v.

NORTHROP CORPORATION,
A CALIFORNIA CORPORATION, DEFENDANT

ORDER OF THE COURT GRANTING NORTHROP'S MOTION TO REAFFIRM SETTLEMENT

Aug. 22, 1994
[Entered Sept. 9, 1994]

Ctrm: Honorable TERRY J. HATTER

Northrop Corporation's ("Northrop") Motion to Reaffirm Settlement in the above-captioned matter came on for hearing before this Court on August 22, 1994. Having considered the pleadings, written and oral argument of relator Max Killingsworth and counsel for each of the interested parties, and the evidence offered by the interested parties, this Court finds as follows:

(1) Applying the standards set forth by the Ninth Circuit Court of Appeals in its Opinion and Order in *United State ex rel. Killingsworth v. Northrop*

Corporation, Case No. 92-55863, ____ F.3d ____, rendered May 23, 1994, this Court finds that the settlement agreement entered into between Northrop and Killingsworth in April 1992 (the "Settlement") was fair, adequate and reasonable under all the circumstances. This Court further finds that the government's allegations that Northrop and Killingsworth colluded to "allocate" the proceeds of the Settlement so as to deprive the government of its fair share of the proceeds are not supported by the evidence. The Settlement was negotiated by competent counsel at arms-length, and the amounts payable to Killingsworth and his counsel are a fair appraisal of the value of his case and services rendered by his counsel; and

(2) The contention that "new" evidence supposedly discovered in 1993 renders the settlement amount referable to the False Claims Act claims less desirable now than when entered into affords no basis for setting aside the Settlement, given the Settlement's consensual nature and the strong public policy favoring settlement and finality in litigation. One of the very reasons settlements are entered into is to account for, and preclude, the risk that subsequent developments may prove helpful or harmful to either of the litigants.

ACCORDINGLY, IT HEREBY IS ORDERED that Northrop's Motion to Reaffirm Settlement be granted, that the Settlement be affirmed, and that

this case be dismissed in its entirety with prejudice as to both Killingsworth and the United States.

* * *

IT IS SO ORDERED.

Dated: Sept. 6, 1994 /s/ TERRY J. HATTER, JR.
TERRY J. HATTER, JR.
District Court Judge

Presented by:

MUNGER, TOLLES & OLSON
Brad D. Brian
Terry E. Sanchez
Marc T.G. Dworsky

By /s/ Marc T.G. Dworsky
MARC T.G. DWORSKY

Attorneys for Defendant
NORTHROP CORPORATION

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-55863

UNITED STATES OF AMERICA, EX REL., APPELLANT,
MAX KILLINGSWORTH, PLAINTIFF-APPELLEE

v.

NORTHROP CORPORATION, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF
CALIFORNIA

Argued and Submitted June 11, 1993
Argued and Submitted on Petition for Rehearing
March 14, 1994
Opinion Filed Jan. 19, 1994
Opinion Withdrawn May 23, 1994

Filed May 23, 1994

ORDER

Before: BROWNING, BRIGHT* and TANG, Circuit Judges

Opinion by Senior Circuit Judge BRIGHT

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* Honorable Myron H. Bright, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

The petition for rehearing filed February 2, 1994, is granted. Upon hearing further oral argument and examining supplementary briefs and other materials, the prior opinion of this court filed January 19, 1994, is withdrawn. A revised opinion is attached to this order and is filed as the opinion of this court in this case.

OPINION

BRIGHT, Senior Circuit Judge:

Max Killingsworth brought a *qui tam* action against the Northrop Corporation [Northrop], alleging it defrauded the United States by inflating cost estimates used to support MX missile contract proposals. During an extended course of litigation, the United States declined to exercise its right to intervene under §§ 3730(b)(2) and (c)(3) of the False Claims Act, 31 U.S.C. § 3730 [the Act]. Killingsworth and Northrop eventually agreed to a settlement, notified the United States, and moved to dismiss the action. The United States objected to the settlement but still declined to intervene in the proceedings. The district court ultimately dismissed the action without the consent of the United States. The United States then moved in the district court to intervene for purpose of appeal, seeking to challenge the stipulated dismissal. The district court denied the motion.

The United States brings this appeal, asserting the district court erred in dismissing this *qui tam* action without the consent of the Attorney General and in denying the government the right to intervene on appeal. We reverse and remand this case for further proceedings consistent with this opinion.

I.

In November of 1988, Max Killingsworth, a former employee of Northrop, filed this action against Northrop under the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730. He alleged Northrop improperly inflated cost estimates supporting MX missile contract proposals. After investigating the allegations for almost eighteen months, the government informed Killingsworth it would not exercise its right under § 3730(b)(4)(A) of the Act to take over the litigation.

Northrop and Killingsworth agreed on a settlement of $500,000, but in May of 1990, the settlement fell through after a dispute over several issues, including fees for Killingsworth's attorneys. Killingsworth obtained new counsel and amended his complaint, adding additional claims, including one that Northrop wrongfully terminated his employment. In June of 1990, the district court entered an order which recognized the government's decision not to intervene and required that "the consent of the Attorney General . . . be solicited before the granting of a dismissal, settlement, or other discontinuation of this action." (Order re Election by the United States Declining Intervention and the Unsealing of Complaint filed June 7, 1990, at 2.)

In December of 1991, Killingsworth and Northrop entered into another agreement to settle the case. The agreement provided that Northrop would pay $1 million for the False Claims Act claim and $3.2 million for Killingsworth's wrongful termination claim including attorneys' fees and costs. Northrop conditioned its participation in the agreement on the government's approval.

For several months, the government discussed the proposed settlement with Killingsworth and Northrop, expressing concern that the bulk of the settlement money would go to the wrongful termination claim. The government thought that the parties might have specifically structured the settlement so as to reduce the amount the government realized; normally entitled to roughly seventy percent of any False Claims Act settlement under 31 U.S.C. § 3730(d)(2), the government would not receive any compensation from the wrongful termination claim. The government further asserted that Northrop failed to pursue a statute of limitations defense to the wrongful termination claim which could have shielded Northrop from liability on that claim.

On March 4, 1992, Killingsworth moved to have the district court approve the settlement and dismiss the case. On March 20, 1992, Northrop filed a statement of nonopposition. The government formally objected to the settlement on April 3, 1992, but still declined to intervene in the action.

Northrop and Killingsworth then reopened settlement discussions, and on April 16, 1992, agreed to shift $500,000 from the wrongful termination claim to the False Claims Act claim. In sum, Northrop would pay $1.5 million on the False Claims Act claim and $2.7 million on Killingsworth's wrongful termination claim and attorneys' fees. On April 20, the district court ordered the government to inform the parties whether it consented to the settlement and, if not, to file a motion seeking leave to intervene in the case.

On May 4, the government informed the district court it did not consent to the district court's dismissal of the action, but again declined to file a motion

to intervene. On May 19, 1992, the district court entered its order of dismissal with prejudice, stating:

> [T]he Attorney General's consent to dismissal is not required in the present circumstances, and that the instant action is dismissed in its entirety with prejudice to both the *qui tam* plaintiff and the United States.

(Corrected Joint Stipulation of Dismissal; Proposed Order Thereon filed May 19, 1992, at 3.)

The government filed a motion seeking leave to intervene for purpose of appeal on May 21, 1992. The district court denied the motion without opinion on June 16, 1992. The government then filed this timely appeal from the district court's dismissal of the action and denial of leave to intervene for purpose of appeal.

II.

The government first contends the district court erred in denying as untimely its motion to intervene for purpose of appeal. It argues that under Fed.R. Civ.P. 24(a) and the Act, it has the right to intervene at this point in the action. Northrop and Killingsworth counter that the failure of the government to intervene in the action at any time prior to the district court's approval of the settlement leaves the parties free to carry out the terms of the settlement and move to dismiss the action.

We review de novo the district court's denial of the government's motion to intervene as a matter of right. *United States ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1393-94 (9th Cir.1992).

The government has attempted to intervene for purpose of appeal under Fed.R.Civ.P. 24(a), Interven-

tion of Right. This court recently permitted intervention under somewhat similar circumstances in *McGough*. In our opinion, *McGough* also controls here and we conclude the government may intervene for purpose of appeal.

In determining whether a party may intervene as of right under Fed.R.Civ.P. 24(a), we apply a four-part test inquiring whether:

> (1) the applicant's motion is timely;
>
> (2) the applicant has asserted an interest relating to the property or transaction which is the subject of the action;
>
> (3) the applicant is so situated that without intervention the disposition may, as a practical matter, impair or impede its ability to protect that interest; and
>
> (4) the applicant's interest is not adequately represented by the existing parties.

McGough, 967 F.2d at 1394 (quoting *Orange County v. Air California*, 799 F.2d 535, 537 (9th Cir.1986), cert. denied, 480 U.S. 946, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987)).

Northrop maintains that the circumstances of the government's motion for leave to intervene for appeal differ from those in *McGough*, because in that case the government was unaware of the proposed settlement until after the district court approved it and ordered the action dismissed. Northrop argues that here the government's motion was not timely because it was aware of the settlement as early as December of 1991 and was informed of the discussions over the ensuing months and failed to intervene during that

period. Northrop argues that the government not only delayed intervention until the expiration of lengthy settlement negotiations, but also disregarded a district court order to intervene or consent to dismissal.[1]

We review the district court's determination that the motion to intervene was untimely under the abuse of discretion standard. *McGough*, 967 F.2d at 1393-94. In determining whether the motion was timely, we consider three factors:

(1) the stage of the proceeding at which an applicant seeks to intervene;

(2) the prejudice to the other parties; and

(3) the reason for and length of the delay.

McGough, 967 F.2d at 1394 (quoting *Air California*, 799 F.2d at 537).

Generally, the court will consider a post-judgment motion to intervene to be timely if filed within the time limitations for filing an appeal. *Yniguez v. Arizona*, 939 F.2d 727, 734 (9th Cir.1991). Here, the government promptly filed its motion after the dismissal of the case with prejudice and thus seeks to intervene for purpose of appeal at an appropriate stage of the proceedings, complying with the first factor of the timeliness test.

The consideration of the motion at this point is not unduly prejudicial to the rights of Killingsworth or

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[1] Prior to dismissing the case, the district court had ordered the government either to consent to the dismissal or to file a motion to intervene. (Tr. of Apr. 20, 1992 Hearing, at 10-11). The government failed to comply with the district court's order.

Northrop, as the passage of time does not significantly worsen their positions. See *United States v. Oregon*, 913 F.2d 576, 588-89 (9th Cir.1990), *cert. denied*, 501 U.S. 1250, 111 S.Ct. 2889, 115 L.Ed.2d 1054 (1991). The government thus complies with the second factor of the test.

Finally, the timeliness test requires an acceptable reason for the delay in filing the motion. The government argues it delayed intervening at the district court level because it sought to avoid the burdens of a litigant, such as discovery, and because of possible *res judicata* effects. It maintains it intervened as soon as possible for purpose of appeal.

It is true that the government had the opportunity to intervene before the district court made its ruling adopting the settlement and dismissing the action. Nevertheless, the district court and the parties seemed to presume the government must intervene formally and become a litigant in the action in order to object at that stage. This would explain why the district court, accepting the government's statement that it did not wish to become a party in the action, ruled that the government had no standing to object to the settlement.

We now reject the district court's reasoning.[2] The statutory scheme of the False Claims Act provides protection for the rights of both the relator and the government. It is clear, however, that in a qui tam action, the government is the real party in interest. *United States ex rel. Milam v. University of Texas*

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[2] We are cognizant of the fact that the statutory scheme at issue here is unique in the law. We also recognize that the precise issue before us now has not yet been adjudicated in the federal courts.

M.D. Anderson Cancer Ctr., 961 F.2d 46, 50 (4th Cir.1992) ("United States is the real party in interest in any False Claims Act suit, even where it permits a *qui tam* relator to pursue the action on its behalf"). Recently, this court cited with approval an interpretation of the Act which permits the government to move for dismissal of some but not all defendants in a *qui tam* action without actually intervening in the case. *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 753 n. 10 (9th Cir.1993) (citing *Juliano v. Federal Asset Disposition Ass'n*, 736 F.Supp. 348 (D.D.C.1990), *aff'd*, 959 F.2d 1101 (D.C.Cir.1992)). Although the issues presented in *Kelly* and *Juliano* differ substantially from those now before us, these cases support the government's right to standing here. As such, we conclude that the government has a right, with or without formal intervention, to ask the court to review a settlement for the purpose of determining whether the provisions of the settlement violate the False Claims Act by improperly allocating to the relator funds which should be paid to the government. See Part IV, *infra*.

As the government was denied a proper hearing before the district court and moved to intervene for purpose of appeal as soon as possible, we conclude the district court abused its discretion in finding the government's motion to be untimely. As the instant case is otherwise indistinguishable from McGough, we hold that the district court erred in denying the government's motion to intervene in a limited way for the purpose of appeal and we therefore proceed with the merits of the case.

III.

The government contends the district court erred in dismissing the action without the consent of the Attorney General, in contravention of its absolute right under the Act to block a settlement. The government's concern about the settlement derives from Northrop's agreement to pay Killingsworth $2.7 million to settle his wrongful termination claim and compensate his attorneys. The government argues that the proposed settlement reflects a deliberate attempt by Northrop and Killingsworth to divert money from the False Claims Act claim to Killingsworth's personal claim. The government further contends Northrop's failure to assert a statute of limitations defense to bar Killingsworth's personal claim brings into question the propriety and validity of the settlement. The government asserts that *McGough* gives it an absolute right to block the settlement and argues that under *McGough* and the plain terms of the False Claims Act, *qui tam* actions may not be voluntarily dismissed over the objection of the Attorney General.

Northrop counters that earlier in the litigation, the government was free to intervene, noting that the district court in fact encouraged the government to intervene and take over the litigation. Northrop maintains that having chosen not to intervene earlier, the government cannot now block the settlement and force Killingsworth to litigate against his will.

The substantive issue in this case—whether the district court erred in dismissing the action without the consent of the government—requires the interpretation of § 3730(b)(1) and is subject to de novo review. *Anderson v. United States*, 966 F.2d 487, 489

(9th Cir.1992). In resolving the difficult and novel question presented by this appeal, we carefully review the provisions of the False Claims Act outlining the interrelationship of the *qui tam* plaintiff and the government.[3]

To place the contested provision in an appropriate context, we first examine the legislative history of the Act. The government's role in a False Claims Act action initiated and pursued by a private party has changed over the years. Under the original statute enacted in 1863, the government had no right to take over an action commenced by a *qui tam* plaintiff. *See* Act of March 2, 1863, ch. 67, 12 Stat. 696; *United States v. Griswold*, 30 F. 762 (C.C.Or.1887). In 1943,

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[3] Because of the novelty and complexity of the statutory issues in this case, we asked the parties to brief two additional issues not presented by the government or the parties in their briefs on appeal: (1) Assuming 31 U.S.C. § 3730(b)(1) is inapplicable: If the government does not formally intervene, does it have standing to object to the proposed settlement on grounds that the settlement allocates the proceeds among multiple claims in a way that deprives the government of its legitimate share under 31 U.S.C. § 3730(d)(2); and (2) If the government does have standing to object to the proposed settlement, to what extent does the trial court have the power to reallocate the settlement proceeds among the various claims. See Order of this court filed September 22, 1993. Additionally, after the government filed a petition for rehearing following publication of our slip opinion on January 19, 1994, we granted the parties additional oral argument held March 14, 1994, in San Francisco, California.

Responding to question one, the government asserts that it does not have to intervene formally to object to a settlement; Northrop and Killingsworth share the contrary view that the government must intervene formally to object. The government, Northrop, and Killingsworth agree that the district court has no power to reallocate settlement proceeds.

the Act was amended to give the government sixty days at the outset of the suit to examine the case and, at its option, proceed with the action within the sixty-day period. *See* Pub.L. No. 78-213, ch. 377, 57 Stat. 608 (1943), (codified at 31 U.S.C.A. § 3730(b)(2)(A) (West 1982)). In 1986, the Act was further amended, giving the government the ability to extend the sixty-day examination period upon a showing of good cause. *See* Pub.L. No. 99-562, 100 Stat. 3154 (1986) (codified at 31 U.S.C.A. § 3730(b)(3) (West Supp.1988)). The amended Act also enabled the government to intervene in the action after the expiration of the sixty-day period upon a showing of good cause. *Id.* at § 3730(c)(3).

The legislative history of the 1986 amendments illuminates the reasoning behind these amendments and undermines the government's claim of an absolute right to block a settlement. The Senate Report accompanying the proposed legislation stated that Congress' "overall intent" was "to encourage more private enforcement" of the Act. S.Rep. No. 345, 99th Cong., 2d Sess. 23-24 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5288-89. The amended Act "increases incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government." *Id.* at 2; 5267. In the debate on the House version of the bill, Representative Brooks spoke of enhancing "the ability of the citizen who brings such a suit to follow through with the litigation." 132 Cong.Rec. H6474, H6479 (1986). According to the Senate Report, the new provision permitting intervention after the sixty-day examination period was added to expand the "limited opportunity for Government involvement" and provide the government the option of intervening in "situations where new and

significant evidence is found" after the government initially declines to intervene. S.Rep. No. 345, 99th Cong., 2d Sess. 26-27 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291-92.[4] We conclude that Congress' intent to place full responsibility for False Claims Act litigation on private parties, absent early intervention by the government or later intervention for good cause, is fundamentally inconsistent with the asserted "absolute" right of the government to block a settlement and force a private party to continue litigation.

The government cites an express provision of the Act to bar the *qui tam* action from being voluntarily dismissed over the objections of the Attorney General. The government relies on Section 3730(b)(1), which states:

> A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

Section 3730(b)(1), however, has limited application[5] and must be read in conjunction with § 3730(b)(2), which gives the government an election "to intervene

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[4] This court reviewed the operative provisions of the Act in *United States ex rel. Kelly v. Boeing Company*, 9 F.3d 743 (9th Cir.1993).

[5] In some circumstances, the government's consent to a dismissal is not required. These situations include court-ordered dismissals and other involuntary dismissals. *See Minotti v. Lensink*, 895 F.2d 100 (2d Cir.1990) and *United States ex rel. Laughlin v. Eicher*, 56 F.Supp. 972 (D.D.C.1944).

and proceed with the action within 60 days after it receives both the complaint and the material evidence and information," and § 3730(c)(3), which provides that the government may intervene "at a later date [after the sixty days] upon a showing of good cause."

The term "intervention" as used in § 3730(b)(2) is accompanied by the phrase "and proceed with the action" and thus the intervention refers to the government's privilege of interceding and becoming a litigant in the action within the sixty days. Here, the government has declined to intervene for the purpose of proceeding with the action. Its appeal expressly states it is objecting to the settlement but does not contemplate taking over or participating in any action should the settlement fail to materialize.

The language in the statute requiring both the government and the court to consent to a dismissal came from the initial *qui tam* statute of 1863. The format and intent of the amended statute, however, do not preserve the government's absolute right to bar a dismissal without intervention except during the first sixty days plus any extension granted after the private person has filed a *qui tam* complaint. Section 3730(b) must be read as a whole. The private person bringing the action must provide full information to the government while the complaint is held in camera under seal for at least sixty days. During this time period, the government may elect to intervene and proceed with the action. § 3730(b)(2). The government for good cause may seek an extension of the sixty-day period while the action remains sealed. § 3730(b)(3). Finally, before the end of the sixty-day period or any extensions, the government shall either proceed with the action or notify the court that it declines to take over the action. § 3730(b)(4). In the latter case the

private person bringing the action shall have the right to conduct the action. § 3730(c)(3).

Thus, the consent provision contained in § 3730(b)(1) applies only during the initial sixty-day (or extended) period. Of course, if the government for good cause exercises its right to intervene at a later date, *see* § 3730(c)(2)(D)(3), its ability to control the litigation arises from its posture as an intervenor.

Further, the government's argument—that without intervention it possesses an absolute right to reject a proposed settlement at any time and for any reason—must be rejected as contradictory to the express language of § 3730(b)(4)(B), which gives the *qui tam* plaintiff "the right to conduct the action." The right to conduct a qui tam action obviously includes the right to negotiate a settlement in that action. Section 3730(d)(2), which provides for the proper allocation of *qui tam* proceeds, confirms the relator's right to settle the action if the government declines to intervene: "If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages." § 3730(d)(2) (emphasis added).

Finally, the government's assertion of an absolute right to block a settlement and dismissal by withholding its consent may represent a meaningless privilege in terms of present-day *qui tam* litigation. Here neither the government nor the relator desires to engage in further litigation. If the parties settle the action without a dismissal and thereby effectively stop litigating the case, the trial court would un-

doubtedly dismiss the suit for failure to prosecute.[6] *See* cases cited, *supra*, n. 5. Conversely, the government may not force Killingsworth and Northrop to continue litigation by refusing to consent to a settlement. *See United States ex rel. Truong v. Northrop Corp.*, 728 F.Supp. 615, 622 (C.D.Cal.1989); *United States ex rel. Stillwell* v. *Hughes Helicopters, Inc.*, 714 F.Supp. 1084, 1093 (C.D.Cal.1989).

Additionally, the government relies on *McGough*, 967 F.2d 1391, to support its alleged right to block any settlement. We held in *McGough* that the government's initial decision not to intervene was not equivalent to a consent to dismissal. *Id.* at 1397. Here, in contrast, we address a question not raised in *McGough* and hold that the government's consent to dismissal is only required during the initial sixty-day (or extended) period in which the government may decide whether to intervene. Moreover, in *McGough*, the government received no notice of the settlement and thus had no opportunity to intervene or object to the settlement. *McGough* cannot be construed to give the government an absolute right to bar a proper settlement where it has had notice of that settlement and where it has declined to take any action.

Thus, we reject the government's construction of the consent to dismissal language of § 3730(b)(1).

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[6] This result would almost certainly occur in *United States ex rel. Gibeault v. Texas Instruments*, 25 F.3d 725 (9th Cir.1994), decided contemporaneously with this case. In that case the sole remaining issue concerned the amount of attorney's fees to be paid plaintiff's counsel. Obviously plaintiff will not proceed with litigation regardless of our resolution of the question relating to the government's asserted right to block the settlement by refusing to consent to the dismissal.

IV.

In addition to attempting to bar the settlement, the government also requested "a chance to be heard on the merits of this issue." (Tr. of Apr. 20, 1992 Hearing, at 8.) The district court essentially denied the government the opportunity to be heard, noting its impression that "the government actually has no standing any longer." (*Id.* at 9.) We assume the district court's impression was based on an interpretation of the Act under which, to raise any objection to the settlement at all, the government was required to intervene formally and take over the litigation. After carefully reviewing the language, history and purpose of the False Claims Act, we must reject the district court's analysis. The government, although it chooses not to fully intervene in the action, retains the right, upon a showing of good cause, to object to a proposed settlement. This right emerges from our interpretation of relevant sections of the Act.

The False Claims Act does not specifically address the government's rights when a *qui tam* plaintiff and defendant arrive at a settlement. The Act, however, does cover the converse situation in which the government settles an action. 31 U.S.C. § 3730(c)(2)(B) states:

> The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the

circumstances. Upon a showing of good cause, such hearing may be held in camera.[7]

The Act also recognizes that a *qui tam* plaintiff can settle a claim when the government does not proceed with an action. Section 3730(d)(2) states:

> If the Government does not proceed with an action under this section, the person bringing the action or *settling the claim* shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. (emphasis added)

Section 3730(d)(3) gives the court the power, under certain circumstances, to reduce the share of the proceeds of the action that the *qui tam* plaintiff would otherwise receive:

> Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of

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[7] In *Kelly*, we stated that on objection by a qui tam plaintiff to a settlement proposed by the government and a defendant, a hearing should be conducted only if the qui tam relator shows a "substantial and particularized need" for one. *Kelly*, 9 F.3d at 753-54 n. 11. We further stated that such a showing could be made if the relator presents a colorable claim that the government-authorized settlement or dismissal is unreasonable in light of the existing evidence. *Id.*

> the proceeds of the action which the person would otherwise receive . . . .

These sections indicate that the district court plays an important role in allocating the proceeds of a settlement by determining the amount to be received by the *qui tam* plaintiff within the overall limitation of no more than 30% of those proceeds (or the 10% limitation under specific circumstances where the relator's source of information comes from public sources). *See* § 3730(d).

We construe the Act as authorizing the district court to bar a *qui tam* plaintiff and defendant from artificially structuring a settlement to deny the government its proper share of the settlement proceeds. We hold the Act grants the district court the power to ensure that the government will receive its proper share of the settlement as provided by statute. Thus, while the government may not obstruct the settlement and force a *qui tam* plaintiff to continue litigation, the government nevertheless may question the settlement for good cause, as it sought to do in this case, with or without formal intervention and without proceeding with the litigation under § 3730(b)(2) or (c)(3).

In *Juliano v. Federal Asset Disposition Ass'n*, 736 F.Supp. 348 (D.D.C.1990), *aff'd*, 959 F.2d 1101 (D.C. Cir.1992), the court faced a similar "all or nothing" contention by the *qui tam* relator in objecting to the government's partial involvement in a case in which the government moved to dismiss some but not all defendants. The court stated:

> Under our federal scheme, the Attorney General, through those acting in his name, decides whom to prosecute for violations of federal law. The Court

> will not assume that the *qui tam* provisions of the False Claims Act were intended to curtail the prosecutorial discretion of the Attorney General. The Act nowhere states that federal prosecutors are confined to proceed in an all or nothing manner, being forced to take or leave the *qui tam* plaintiff's charges wholesale. Nor does the Act state that the *qui tam* plaintiff remains free to prosecute any person or entity he wishes, provided the government declines to take over the action. With these considerations in mind, the Court concludes that the government's motion to dismiss certain named defendants is entirely proper.

Id. at 351. We think it important that this circuit has cited this discussion of limited intervention in *Juliano* with approval. *Kelly*, 9 F.3d at 753 n. 10.

Under section 3730(c)(3), the government's right to intervene at a late date requires a "showing of good cause." This procedure is detailed in *Kelly*:

> Several of the control mechanisms built into the qui tam provisions are qualified. For example, the government . . . must show 'good cause' in order to intervene in an action which has already commenced. *Id.* § 3730(c)(3).

Id. at 753-54. We hold that the "good cause" language should also apply to the limited intervention sought here by the government. *See Juliano*, 736 F.Supp. at 351. As noted earlier, § 3730(c)(2)(B) of the Act authorizes the district court to review a settlement, on objection of the relator, to determine whether it is fair and reasonable. We now interpret the Act to provide a similar opportunity to the government; that is, when the government objects with good cause to a

proposed settlement, it has a right to a hearing, as would an objecting relator under § 3730(c)(2)(B).

Here, the government's objections to the proposed Killingsworth-Northrop settlement rest on good cause. The circumstance that the qui tam plaintiff will receive $2.7 million in settlement of his personal claim and attorney's fees in the face of a possible statute of limitations defense presents the issue whether the total proceeds of the settlement have been fairly allocated so as to give the government its due.[8]

Therefore, on remand the district court should hold a hearing to determine whether the proposed settlement fairly and reasonably allocates the settlement funds. If the district court approves the settlement, it may dismiss the case. On the other hand, if the district court finds that the amount to be paid to Killingsworth and his counsel is not a fair appraisal of the value of his case and services rendered by his counsel, it may disapprove the settlement as structured. In the latter instance, the parties are entitled to continue with the litigation.

Accordingly, we vacate the dismissal of the action and REVERSE AND REMAND this case for further proceedings consistent with this opinion.

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[8] We do not intend to express our view on the merits of this inquiry, however.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 88-6635 TJH (Ex)

UNITED STATES, EX REL. MAX KILLINGSWORTH,
PLAINTIFFS

vs.

NORTHROP CORPORATION,
A CALIFORNIA CORPORATION, DEFENDANT

CORRECTED JOINT STIPULATION OF DISMISSAL;
PROPOSED ORDER THEREON

[Filed May 19, 1992]

The parties to this action, by and through their counsel of record, hereby stipulate as follows:

1. The present action (the "Action") was brought against defendant Northrop Corporation ("Northrop") by *qui tam* plaintiff Max Killingsworth ("Killingsworth") on behalf of the United States Government pursuant to the False Claims Act, 31 U.S.C. § 3729 *et seq.* (the "Act"), and on his own behalf for personal wrongful discharge claims under California law.

2. Pursuant to Section 3730(b) of the Act, the government investigated Killingsworth's claims under the Act and subsequently filed a notice with this Court stating that it would not participate in the Action.

3. Killingsworth has decided to settle this action in its entirety and not to prosecute further the claims alleged in the original Complaint or the First Amended Complaint.

4. On March 4, 1992 Killingsworth filed a motion with this Court seeking a ruling that the consent of the government to dismissal of the Action with prejudice was unnecessary. On April 16, 1992 Northrop filed a memorandum in support of Killingsworth's motion, contending that where, as here, the government has declined to participate in an action under the Act, and that action is not discontinued or withdrawn but in fact is brought to fruition by the relator, the government cannot frustrate settlement merely by withholding its consent to dismissal.

5. On April 20, 1992, after hearing argument in this regard, the Court agreed with Killingsworth and Northrop and indicated that its "intended ruling [was] that the government actually has no standing any longer to object" to dismissal of the Action. (*See* Reporter's Transcript of Proceedings, April 20, 1992, at p. 9). The Court further ordered that the government notify counsel for Killingsworth and Northrop by May 4, 1992 whether it consented to dismissal of the Action and, if it did not so consent, that it file a motion by that date seeking leave to intervene in the Action. *Id.*, at pp.10-11. The Court also stated that it did not believe the government could establish its entitlement to intervene at this late date. *Id.*, at p.11.

6. On May 4, 1992 the government informed counsel for Killingsworth and Northrop that it did not consent to dismissal of the Action. Contrary to the Court's order, however, the government did not file a motion seeking leave to intervene in the Action.

7. Killingsworth agrees to dismiss the Action with prejudice as to both himself and the United States.

Dated: May 15, 1992

LAW OFFICES OF HERBERT HAFIF

By /s/ Phillip E. Benson by B. Br.
PHILLIP E. BENSON
Attorneys for Plaintiff MAX KILLINGSWORTH, on his own behalf and for the United States.

Dated: May 15, 1992

MUNGER, TOLLES & OLSON
BRAD D. BRIAN
TERRY E. SANCHEZ
MARC T.G. DWORSKY

By /s/ Brad D. Brian
BRAD D. BRIAN
Attorneys for Defendant

* * * * *

IT IS ORDERED that the Attorney General's consent to dismissal is not required in the present circumstances, and that the instant action is dismissed in its entirety with prejudice as to both the *qui tam* plaintiff and the United States.

Dated: May 19, 1992 /s/ TERRY J. HATTER, JR.
HONORABLE TERRY J. HATTER, JR.
United States District Court

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-56599
D.C. No. CV-88-6635-TJH

UNITED STATES OF AMERICA, EX REL.
MAX KILLINGSWORTH, PLAINTIFF-APPELLANT

vs.

NORTHROP CORPORATION,
DEFENDANT-APPELLEE

[Filed March 22, 1996]

ORDER

Before: POOLE and O'SCANNLAIN, Circuit Judges, and MARQUEZ,* District Judge

Judges Poole and O'Scannlain have voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc. Judge Marquez has voted to grant the petition for rehearing but to deny the suggestion for rehearing en banc.

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* The Honorable Alfredo C. Marquez, Senior United States District Judge for the District of Arizona, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX F

STATUTORY PROVISIONS

Section 3730 of Title 31 of the United States Code provides:

Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.-The Attorney General diligently shall investigate a violation under Section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this Section against the person.

(b) ACTIONS BY PRIVATE PERSONS.-(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene

and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall-

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.-(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to

continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as-

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses; or

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.-(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing in a congressional, administrative, or

Government[1] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action

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[1] So in original. Probably should be "General".

was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.-(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary,

or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government[2] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

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[2] So in original. Probably should be "General".

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.-The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.-In civil actions brought under this section by the United States, the provision of Section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

Supreme Court, U.S.
FILED
SEP 17 1996

No. 96-123

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,
v.
NORTHROP GRUMMAN CORPORATION
AND MAX KILLINGSWORTH,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT NORTHROP GRUMMAN CORPORATION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in view of the False Claims Act's express provision that a person bringing a *qui tam* action under the Act "shall have the right to conduct the action," the court of appeals correctly concluded that the government does not have an absolute and unreviewable right to veto a settlement that, after a hearing on the government's objections, the district court explicitly found to be "fair, adequate and reasonable under all the circumstances."

2. Whether this Court has jurisdiction to review the government's purported motion to intervene, which was never properly filed in the district court and thus was not ruled upon by either the district court or the court of appeals.

PARTIES TO THE PROCEEDING

Respondent Max Killingsworth filed this *qui tam* action in the district court in the name of the United States of America, as required by 31 U.S.C. §3730(b)(1).

Petitioner United States of America, as represented by the United States Department of Justice, participated in the proceedings in the district court, but without becoming a formal party to the action in that court. However, petitioner was granted leave to intervene for purposes of its appeals to the United States Court of Appeals for the Ninth Circuit.

Respondent Northrop Grumman Corporation, named as "Northrop Corporation" in the proceedings below, is a publicly traded corporation. It currently has no parent corporation, nor does it have any nonwholly owned subsidiaries.

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Respondent Northrop Grumman Corporation ("Northrop") respectfully prays that this Court deny the government's petition for a writ of certiorari in this case.

STATEMENT OF THE CASE

1. Killingsworth's Original Complaint

On November 9, 1988, respondent Max Killingsworth ("Killingsworth"), a former Northrop employee, commenced this case under the *qui tam* provisions of the False Claims Act ("FCA"). Killingsworth's complaint alleged that, during the course of Northrop's negotiations with the government over non-competitive contracts relating to the MX or "Peacekeeper" missile program, Northrop had a "routine pattern and practice of inflating labor cost estimates and concealing this from the Government." E.R. 11.[1] The complaint asserted that, as a result of this practice, the government was "overcharged on each and every non-competitive [MX] contract award with Northrop." *Id.* The complaint identified five particular contracts as examples of this purported practice, *id.* at 5-10, and alleged that the government's damages were between $60 million and $100 million, depending upon, *inter alia*, "the amount of the contracts affected by the practice of cost inflation," *id.* at 12.

2. The Government's Decision to Decline Intervention

After Killingsworth filed the complaint under seal and *in camera* (as required by the FCA), the government proceeded to investigate the allegations at length — seeking, and obtaining, at least eight separate extensions of time to complete its investigation, thereby extending the under-seal period from November 9, 1988 to June 1990. During its 18-month investigation, the government, by its own account, "executed a search warrant that yielded many thousands of

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[1] All citations of the excerpts of record are from the excerpts filed in C.A. No. 94-56599. References to the district court clerk's record are designated by "Clerk's Rec.," followed by the document control number and, if applicable, the page numbers.

documents, interviewed scores of individuals and engaged in other efforts to investigate the allegations." Supp. E.R. 85. Approximately 100,000 pages of documents were seized or subpoenaed by the government. Clerk's Rec. 73 at 2.

At the conclusion of its investigation, the government elected not to intervene. As the government later explained, it declined to take over this action because it concluded that the alleged practices were pervasive throughout the industry, and it wished to find a better test case that would "most clearly reveal the practice" and "be most likely to yield a judicial determination that this practice is illegal." Supp. E.R. 86.

Upon learning of the government's decision not to participate, Killingsworth's attorneys decided that they would not prosecute the case further. Supp. E.R. 106. The government thereupon negotiated a tentative settlement with Northrop in the amount of $500,000, but the settlement ultimately collapsed. *Id.*[2] On June 11, 1990, after the government had filed a formal notice declining intervention, the district court ordered the complaint unsealed.

3. Killingsworth's Amended Complaint

Killingsworth filed an amended complaint on September 17, 1990. E.R. 15-55.[3] The amended complaint differed from the original complaint in two principal respects. First, it added a cause of action for constructive wrongful discharge, alleging that Killingsworth had no choice but to resign after he informed his superiors that he refused to participate in Northrop's alleged misconduct. *Id.* at 42-44, 53. Second, although the amended complaint (like its predecessor) continued broadly to assert that Northrop had a routine pattern and practice of improperly inflating its labor costs on all of its MX contracts, *id.* at 28, it specifically identified several addi-

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[2]The court of appeals' opinion erroneously describes this agreement as having been reached between Northrop and Killingsworth, rather than Northrop and the government. Pet. App. 12a.

[3]The government's petition incorrectly states that the amended complaint was filed in 1991. Pet. 4.

tional MX contracts allegedly exemplifying this purported practice, *id.* at 22-23.

4. The District Court's First Dismissal of the Action

For more than one year after the filing of the amended complaint, Killingsworth and Northrop vigorously litigated this case, with both parties taking numerous depositions and Northrop making available more than 250,000 pages of documents in response to Killingsworth's various discovery requests. Clerk's Rec. 73 at 2.

After Killingsworth testified in his deposition that he had absolutely no evidence — other than speculation — to support his allegations concerning the additional specific contracts that he had added to the amended complaint, Northrop moved for summary adjudication with respect to those contracts on November 6, 1991. Clerk's Rec. 72. Even though the granting of Northrop's motion would have resulted in the dismissal of these claims with prejudice as to both Killingsworth *and the United States*, the government made no effort to oppose it. Confronted with Northrop's motion, Killingsworth agreed to settle the case, and the parties thereupon agreed to defer the summary judgment hearing, and to suspend all discovery, pending the outcome of the government's review of the settlement. Clerk's Rec. 78.

Under the December 1991 settlement agreement, Northrop and Killingsworth agreed to resolve the *qui tam* claims for $1,000,000 (twice what the government had agreed to in early 1990), and to settle Killingsworth's wrongful termination claim for $3,200,000 (a sum that included attorneys' fees and costs). Pet. App. 12a. The government, however, disapproved of the settlement. While the government did not question the adequacy of the overall settlement amount, it speculated that the parties might have colluded to allocate an inordinate portion to the wrongful discharge claim (in which the government would not share). *Id.* at 13a. Both Northrop and Killingsworth thereafter repeatedly communicated with

the government in an attempt to assuage the government's suspicions. Supp. E.R. 77-78, 176-77, 245-47.

Ultimately, frustrated over the impasse created by the government's skepticism, Northrop expressly invited the government "to intervene for the purposes of settling the False Claims Act claim, possibly over [Killingsworth's] objection if necessary." Supp. E.R. 178. The government refused to do so, yet continued to oppose the settlement.

Similarly frustrated, Killingsworth filed a motion in March 1992 asking the district court to approve the settlement. Pet. App. 13a. The government opposed this motion. *Id.* Once again, the government did not raise any objection to the adequacy of the overall settlement; rather, its sole objection was its fear that the parties might "have colluded to allocate the bulk of the settlement proceeds to a weak, if not totally sham, wrongful discharge claim . . . ." Supp. E.R. 90. The government offered no support for this accusation, other than its professed belief that the wrongful discharge claim was arguably time-barred. *Id.* at 95-96.

On April 16, 1992, in an attempt to satisfy the government's unspecified demand for more money, Killingsworth agreed to surrender $500,000 more to the FCA claim. Supp. E.R. 157. Thus, the revised agreement provided that Northrop would pay $1,500,000 to settle the FCA claim (*three times* the amount that the government previously had been willing to accept); $1,000,000 to settle Killingsworth's claim for attorneys' fees and costs; and $1,700,000 to settle the wrongful termination claim. *Id.* Northrop thereupon filed a memorandum with the district court requesting that the revised settlement be approved and the action dismissed, with or without the government's consent. Supp. E.R. 151-74.

On May 4, the government stated that it would not consent to the settlement or to dismissal of the case. Pet. App. 13a-14a. The district court, however, held that "the Attorney General's consent to dismissal is not required in the present circumstances," and dismissed the action with prejudice as to both Killingsworth and the government. *Id.* at 33a.

5. The Government's First Appeal

The government appealed the dismissal.[4] The court of appeals rejected the government's claim that it had an unconditional right to veto a settlement, holding that such a claim was contrary to the text of the statute, its legislative history, and common sense. Pet. App. 19a-25a. Nonetheless, the court held that the government's objection to a settlement was a form of "limited intervention" permitted by 31 U.S.C. § 3730(c)(3), as long as the government could show "good cause" for its objections. *Id.* at 26a-30a. Accordingly, the court vacated the dismissal and remanded the case for a hearing with respect to the government's allegations of collusion. *Id.* at 30a.

The court of appeals rejected the argument that § 3730(b)(1), which provides that a *qui tam* action "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting," governed here. The court explained that this provision was not without limits, observing that other courts long had recognized that there were limitations on the government's power to block a dismissal. Thus, for example, the government's consent had been held not to be required in cases involving "court-ordered dismissals and other involuntary dismissals." Pet. App. 22a & n.5 (citing *Minotti v. Lensink*, 895 F.2d 100 (2d Cir. 1990), and *United States ex rel. Laughlin v. Eicher*, 56 F. Supp. 972 (D.D.C. 1944)).

The court also noted that the government's extreme interpretation of § 3730(b)(1) was inconsistent with other language in § 3730 that addressed the government's and the relator's respective rights following an initial declination of intervention by the government:

> [T]he government's argument — that without intervention it possesses an absolute right to reject a proposed

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[4] While the first appeal was pending, the parties continued to engage in settlement negotiations. In March 1994, the government offered to settle the entire FCA claim for less than $2.135 million. Supp. E.R. 274-75.

> settlement at any time and for any reason — must be rejected as contradictory to the express language of § 3730(b)(4)(B), which gives the *qui tam* plaintiff "the right to conduct the action." The right to conduct a *qui tam* action obviously includes the right to negotiate a settlement in that action. Section 3730(d)(2), which provides for the proper allocation of *qui tam* proceeds, confirms the relator's right to settle the action if the government declines to intervene: "If the Government does not proceed with an action under this section, the person bringing the action *or settling the claim* shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages."

Pet. App. 24a (reflecting emphasis added by court of appeals, as shown at 25 F.3d 715, 722-23).

Moreover, the court concluded that construing § 3730(b)(1) as giving the government an absolute right to block a voluntary dismissal would not ultimately preclude dismissal of the suit pursuant to a settlement. The court noted that, if the parties settle the action and stop litigating without a dismissal, "the trial court would undoubtedly dismiss the suit for failure to prosecute." Pet. App. 24a-25a. Conversely, the court held that "the government may not force Killingsworth and Northrop to continue litigation by refusing to consent to a settlement." *Id.* at 25a.

The court also held that the government's position was inconsistent with the legislative history, which established Congress' intent " 'to encourage more private enforcement' of the Act." Pet. App. 21a (quoting S. Rep. No. 345, 99th Cong., 2d Sess. 23-24, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5288-89). After reviewing the legislative materials, the court held that "Congress' intent to place full responsibility for [FCA] litigation on private parties, absent early intervention by the government or later intervention for good cause," is "fundamentally inconsistent with the asserted 'absolute' right of the government to block a settlement and force a private party to continue litigation." *Id.* at 22a.

Having concluded that the FCA did not give the government an unqualified right to block a settlement of a *qui tam* action in which it had not intervened,[5] the court nonetheless rejected what it characterized as Northrop's "all or nothing" position that the government could object to a settlement only by intervening and taking over the litigation. Pet. App. 28a; *see also id.* at 17a-18a. The court concluded that there was no reason why the government could not intervene for the limited and sole purpose of objecting to the settlement. *Id.* at 29a. The court held, however, that any such limited intervention would be subject to § 3730(c)(3)'s requirement that a post-declination intervention could be granted only upon a showing of "good cause." *Id.* ("We hold that the 'good cause' language [of § 3730(c)(3)] should also apply to the limited intervention sought here by the government.").

Finally, the court concluded that, if the government could establish that Northrop and Killingsworth had structured the settlement so as to deprive the government of its due, that would constitute "good cause." Pet. App. 30a. Accordingly, the court vacated the dismissal and remanded the case with specific instructions to "hold a hearing to determine whether the proposed settlement fairly and reasonably allocates the settlement funds." *Id.*

6. The District Court's Second Dismissal of the Action

On remand, Northrop filed a motion to reaffirm the settlement. Pet. App. 4a. Northrop reviewed each element of the settlement and explained in detail why it was appropriate. In particular, Northrop explained that the settlement sum allocated to Killingsworth's personal claim "was reasonable given the substantial legal uncertainty regarding the applicable

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[5]The court recognized that the various reasons for concluding that § 3730(b)(1) did not confer an absolute right to veto a *qui tam* dismissal would *not* apply during the period in which the government was still investigating the case, because during that period the relator would not yet have acquired the right to control the litigation. Pet. App. 23a-24a.

statute of limitations, and the potential risk and exposure harbored by that claim." Supp. E.R. 53.[6]

After obtaining two extensions of time, the government filed an opposition on July 22, 1994. Clerk's Rec. 124. Once again, the government stated that its "primary concern" was "that insufficient funds were allocated to the [FCA] portion of the deal." *Id.* at 8. For the first time, however, the government also claimed that the expanded scope of the amended complaint's FCA claim justified a higher *overall* settlement. *Id.* at 10. Although the amended complaint had been served on it almost four years earlier, the government claimed that it had been deprived of "the opportunity to explore the new allegations." *Id.* at 5. The government stated that "Killingsworth ha[d] recently pressed [it] to review new evidence that he ha[d] obtained from another Northrop case, evidence which he claims demonstrates the existence of pads in other MX contracts added to his Amended Complaint." *Id.* The government did not, however, attach any of these "new" documents to its opposition. Instead, it attached copies of documents, obtained during the *initial* investigation, that it claimed illustrated Northrop's alleged misconduct, and argued that "[i]f those practices also took place in the contracts Killingsworth has added to the case, then the $1.5 million

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[6] Northrop explained that "[it] — unlike the government — had something to lose as a consequence of any [failed] assault on Killingsworth's wrongful termination claim," and that Northrop therefore "did not share the government's glib assessment that Northrop should have brought a preemptive motion on the limitations issue." Supp. E.R. 69. In fact, case law postdating the April 1992 settlement confirms the validity of Northrop's concerns over the uncertainty surrounding the limitations issue. *See, e.g., Regents of the University of California v. Superior Court*, 33 Cal. App. 4th 1710, 1716 n.5 (1995) ("It appears to be an open question whether a one-year statute . . ., a two-year statute . . . or a four-year statute . . . governs the cause of action for tortious wrongful discharge.") (citations omitted); *see also Neal v. Honeywell Inc.*, 33 F.3d 860, 865-66 (7th Cir. 1994) (holding that a six-year statute of limitations applies to 31 U.S.C. § 3730(h) — a whistleblower-retaliation provision that arguably could have been added to Killingsworth's complaint as late as 1994).

allocated to the FCA claims is woefully inadequate." *Id.* at 11.

In its reply, Northrop asserted that the government's new objection was disingenuous because: (1) the government never had mentioned such a concern before in over two years of litigation; (2) the allegations of the amended complaint were not in fact new, because the premise of even the original 1988 complaint was that Northrop had a "pattern and practice" of inflating its cost estimates for all of its MX contracts; (3) even after the amended complaint was served, the government never made any effort to investigate the additional contracts; and (4) as recently as March 1994, the government had offered to settle all of the FCA claims for less than $2.135 million, thus confirming that "the parties' settlement of the [FCA] claim is well within the range of reasonableness and that the government's attempts to obtain additional funds from the parties is unjustified." Supp. E.R. 264-65, 269-71, 274-75.

Although the hearing on the settlement already had been continued three times, the government filed a request for a fourth continuance less than a week before the rescheduled hearing date. Clerk's Rec. 127. The government claimed that, based on the purported "new" documents — which the government later admitted it had reviewed a year earlier[7] — it

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[7] In a highly improper attempt to alter the record before this Court, the government's petition (p.8 n.3) seeks to withdraw the government's concession, made repeatedly in the court below, that Killingsworth "initially showed the new documents to an Assistant United States Attorney in 1993." U.S. Br., C.A. 94-56599 at 11; *see also* Reply Br., C.A. 94-56599 at 1, 9. In doing so, the government seeks to nullify the court of appeals' conclusion that "Killingsworth provided copies of the new documents to an Assistant United States Attorney in 1993," Pet. App. 3a — a fact that the court relied upon in affirming the district court's judgment in this case. *See* Pet. App. 6a n.3. The government's argument is based, not on anything in the record, but on the government's unsworn, hearsay representation that the (unnamed) Assistant U.S. Attorney in question "has since informed us that our earlier statement was in error." Pet. 8 n.3. As explained below, the government's use of inadmissible hearsay to contra-

wanted additional time in order to decide whether to intervene. *Id.* at 2-4. Once again, however, the government did not present any of these alleged new documents to the district court.

At the hearing on August 22, the government began by renewing its request for a fourth continuance. E.R. 80. The government informed the court that it had now decided to file a motion to intervene, and it therefore requested additional time "to allow the government to file that motion." *Id.* at 80-81. After hearing argument on the request for a continuance, the court denied it. *Id.* at 87. The district court then invited the government to begin the hearing on whether the settlement should be affirmed. *Id.* at 87-88.

Government counsel responded by stating that "we have submitted a brief that sets forth all of the initial reasons for objecting to the settlement agreement and I'm not going to repeat that to the Court." E.R. 88. The government did not offer any additional evidence, and did not request an opportunity to cross-examine any of the percipient witnesses who participated in the settlement — Killingsworth, Northrop's attorneys (including in-house counsel), and Killingsworth's former attorney — all of whom were present in the courtroom, *id.* at 79. Moreover, despite the fact that government counsel claimed that the "new documents" were "intertwined completely with the question of whether the settlement is fair and reasonable," *the government — for the third time — did not present those documents to the court. Id.* at 88.

After additional argument, the court rejected the government's objections and reaffirmed the settlement. *Id.* at 90. The court thereafter issued a written order finding that the settlement "was fair, adequate and reasonable under all the

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dict a statement of fact in the court of appeals' opinion is wholly improper. *See infra* at 17-18. In any event, the record before the district court contains a sworn declaration from a government attorney stating that he had been shown the documents in March 1994 — demonstrating that the government had been aware of the supposedly "new" documents for *at least five months* before the date of the hearing. E.R. 75-76.

circumstances," and rejecting the government's claim that the parties had improperly allocated the settlement proceeds as "not supported by the evidence." Pet. App. 8a.

Two days after the hearing, the government belatedly attempted to file a motion to intervene, but the district court's clerk's office refused to accept it for filing because the court already had terminated the case by reaffirming the settlement. Pet. App. 5a n.2.

7. The Government's Second Appeal

The government again appealed. The court of appeals affirmed, holding that the district court "properly determined the reasonableness and fairness of the proposed settlement." Pet. App. 5a. With respect to the government's claim that its new evidence — albeit never presented — should have made a difference to the outcome, the court explained that its prior order effected only a "limited remand" that merely required the district court to hold a hearing on whether Killingsworth and Northrop "colluded to shift the majority of the settlement funds to Killingsworth's personal claim and attorney's fees — thereby depriving the government of its fair share." *Id.* at 5a-6a. Because the district court "properly followed our remand order," the court of appeals held that the district court "did not err by refusing to consider the alleged new evidence relating to other issues." *Id.* at 6a.

The court also rejected the government's argument that the district court should have allowed "additional time for discovery" concerning the "new" evidence before holding the hearing on the settlement. *Id.* at 6a n.3. The court noted that the government "concedes that it was aware of the alleged new evidence since 1993," but nonetheless "failed to conduct discovery between its receipt of such evidence in 1993 and the court's dismissal of the action in August 1994." *Id.* Accordingly, the court held that the district court "properly refused the government's eleventh-hour discovery request." *Id.*

Finally, the court rejected the government's attempt to "appeal" the clerk's refusal to accept the late motion to inter-

vene. *Id.* at 5a n.2. The court rejected as "nonsensical" the government's argument that "the clerk's return of the motion is tantamount to a denial of the motion, and, therefore, appealable." *Id.* The court held that, although the government had informed the district court at the August 22 hearing that it intended to file such a motion, the purported motion "was never properly before the district court and we decline to address it for the first time on appeal." *Id.*

REASONS FOR DENYING THE PETITION

A. The Question Whether the Government Has an Unconditional Right to Veto a Court-Approved *Qui Tam* Settlement Does Not Warrant This Court's Review

The government correctly concedes that the court below was "the first court of appeals to address the question" whether the government has an absolute and unconditional right to veto a settlement that has been found by the courts to be fair, adequate, and reasonable. Pet. 21. Accordingly, as the government also concedes, "[n]o circuit conflict exists on the issue." *Id.*

That the first question presented by the petition is novel and involves no split among the circuits is reason enough to deny review. Moreover, the government has failed to demonstrate the sort of compelling reasons that might conceivably justify this Court's immediate resolution — without the benefit of any additional guidance from other courts — of what the court of appeals described as a "difficult and novel question." Pet. App. 20a. Furthermore, the government's procedural mishandling of this case in the courts below — coupled with the fact that the settlement was expressly found by the district court to be "fair, adequate and reasonable" — makes this case an exceptionally poor vehicle for addressing this issue, which in any event was correctly resolved by the court of appeals. Review should be denied.

1. There Are No Compelling Reasons Why This Court Should Prematurely Address this Question, Which is Novel and Involves No Circuit Conflict

The government claims that this Court's immediate attention to the first question is necessary, despite the lack of a circuit conflict, because "the court of appeals' rulings in this case will have an immediate and serious impact on a large portion of existing and future *qui tam* litigation" in that it "depriv[es] the Attorney General of the right to prevent unreasonable *qui tam* settlements." Pet. 21.

The government's dire predictions are based on a fundamental misapprehension. The court of appeals did *not* hold that the Attorney General lacks power to prevent "unreasonable *qui tam* settlements." To the contrary, the court held that the government has considerable powers in this regard. First, the government can intervene as a party-litigant and thereby "control the litigation," including any settlement. Pet. App. 24a. Second, the court held that, even "without formal intervention and without proceeding with the litigation," the government still can block a settlement simply by showing "good cause," *i.e.*, by showing that the settlement is improper. *Id.* at 28a-29a. Indeed, the government expressly concedes that, "under the court of appeals' theory," a settlement cannot be approved "if the district court finds that the Attorney General's objections have merit or that the settlement is otherwise improper." Pet. 17. Because the government can thus prevent approval of any settlement it can demonstrate is unreasonable — something it was unable to do here — the court of appeals' decision merely amounts to the rather unremarkable holding that, absent formal intervention, the government lacks the power to block *reasonable* settlements. The court of appeals' decision in this case thus will have an impact only in the presumably rare circumstance in which the government objects to a settlement, but does so mistakenly, unreasonably or arbitrarily, or for an improper purpose.

Needless to say, there is no public interest, much less a vital one, in ensuring that the Attorney General has an unreviewable and standardless power to veto proper settlements. An Article III court, being a truly disinterested body, has no incentive to approve settlements that are contrary to the public interest. The court of appeals' refusal to recognize an *unconditional* veto thus will *not* "substantially complicate the process of negotiation and settlement of *qui tam* cases," nor will it require the government to "interven[e] in an increased number of cases." Pet. 22. Rather, it merely places on the government the presumably modest burden of substantiating its concerns to the satisfaction of an impartial tribunal. If a settlement genuinely threatens the public interest, surely the government — with its substantial powers for coercive investigation — will be able to corroborate its concerns on the record. Thus, it is virtually inconceivable that the decision below will have any adverse impact on the Attorney General's ability "to protect the interests of the government and of the public." *Id.* at 10.[8]

If anything, the decision below *enhances* the likelihood that *qui tam* suits will be resolved in a fair and equitable manner. Although the government makes much of the fact that, in a situation where the *qui tam* claim is paired with a personal claim, the relator has a strong interest in attempting to allocate as much of the settlement as possible to the personal claim, Pet. 13, it fails to note that it, too, has a self-interest that may cause it to push for a settlement that does not represent the most equitable resolution of *both* claims. Thus, notwithstanding the government's self-serving representation that it "has no interest in rejecting a reasonable settlement," *id.* at 17, the government in such a case has a significant incentive to use its leverage over the *qui tam* claim

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[8] The government also states that it needs an absolute and unconditional veto in order to preclude settlements in which the relator releases the contractor from liability for conduct not alleged in the complaint. Pet. 13-14. There is no basis for supposing that courts will approve such settlements over the government's objections, if well-founded.

to exact as much as possible from the settlement of the personal claim. The relator (who stands to lose the most from such reallocation) will, of course, strongly resist it. The contractor is caught in the middle, and—most importantly—is unable to secure a separate peace on the *qui tam* claim because of the government's refusal to intervene and settle the claim over the relator's objections. By requiring the government either to intervene in the case or, at the very least, to substantiate its objections, the decision below ensures that the government will limit the use of its leverage to those cases in which there is good reason for objecting.[9]

Put simply, the decision below does not involve any broad issue of surpassing national importance that requires this Court's immediate intervention into this novel and developing area of the law.[10]

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[9] Ironically, as the court of appeals observed, instead of furthering the public interest, the government's claim to an absolute veto is at odds with the principal purpose of the 1986 amendments to the FCA, which was to enhance " 'the ability of the citizen who brings such a suit to *follow through with the litigation*. . . .' " Pet. App. 21a (quoting 132 Cong. Rec. H6474, H6479 (1986)) (emphasis added). Congress recognized the importance of *qui tam* relators to the enforcement of the FCA and sought " 'to encourage more private enforcement' of the Act" by " 'increas[ing] incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government.' " *Id.* (quoting S. Rep. No. 345, 99th Cong., 2d Sess. 2, 23-24, *reprinted* in 1986 U.S.C.C.A.N. 5266, 5267, 5288-89).

[10] The government also claims that review is warranted because the result below "threaten[s] to immunize a very substantial degree of fraud." Pet. 22. This claim is based on alleged "newly discovered evidence" showing that the "potential fraud in this case [is] in excess of $110 million." *Id.* As explained below, however, the evidence in question is not new and, more importantly, *is not even in the record in this case. See infra* at 17-19. Moreover, the government's allegations concerning the size of the damages involved in this case must be taken with a very large grain of salt. Such self-serving estimates often bear only a limited relationship to the case's ultimate settlement value, given the numerous difficulties and uncertainties in establishing liability in complex litigation. In this regard, it is instructive to consider the disparity between the government's previous claims about the size of the damages and the

2. The Question is Poorly Presented by the Facts of This Case

Even if the first question presented were otherwise worthy of this Court's review, the record makes clear that this case is a poor vehicle for addressing it. As the record shows, the government's inability to block the settlement in the lower courts was directly attributable to its own failure to substantiate its objections. In addition, the presentation of the issue here is substantially complicated by the government's shifting strategic decisions and its repeated procedural defaults in the lower courts. Even if this Court were inclined to address the question presented without any circuit conflict, it would be advised to await a case in which the government has made a better record below for objecting to a *qui tam* settlement, but nonetheless still has lost. In such a case (unlike this one), the government's claim of an unconditional right to block a settlement might be presented in meaningful relief, because the proximate cause of the government's failure to prevail would be its lack of an absolute veto, rather than its inability to substantiate any grounds for disapproving the settlement. The record in this case, however, is too procedurally messy to make a grant of certiorari appropriate (even assuming that the question were otherwise worthy of review).

From the time of the initial settlement in December 1991 until the court of appeals' first decision in May 1994, the government's sole objection to the settlement was that the proceeds were unfairly allocated to Killingsworth's personal claim. Indeed, that is why the court of appeals' mandate in *Killingsworth I* was expressly limited to that issue. *See supra*

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amount at which the government was willing to settle the case. As recently as March 1994, the government offered to settle the entire FCA case for less than $2.2 million, *see* Supp. E.R. 274-75, even though the government asserted that, *before receiving the "new" evidence*, it already had evidence allegedly showing "hidden management reserves of nearly *$60 million* in numerous contracts." U.S. Br., C.A. 94-56599 at 32 (emphasis added).

at 7, 11. That theory — which was expressly found by the district court to be unsupported by the evidence, *see* Pet. App. 8a — was all but abandoned by the government on the remand from *Killingsworth I* (and is scarcely mentioned in its petition in this Court).

On remand, however, the government made an abrupt about-face and claimed, for the first time, that the *overall amount* of the settlement undervalued the FCA claim. In order to excuse its having failed to raise this objection earlier (despite having received a copy of the amended complaint in 1990), the government claimed that the objection was based on "new evidence." The court of appeals, however, specifically found that because the government had been aware of this alleged evidence since at least 1993 but had opted to do nothing about it, the district court did not abuse its discretion in refusing the government's "eleventh-hour" request for additional time to present this purported evidence. Pet. App. 6a n.3. The government thus never provided any evidentiary basis for its newfound objection.

The government seeks to avoid these serious obstacles in the record by taking the extraordinary step of proffering inadmissible facts that are outside the record and then asking this Court to disregard the lower court's holdings that were based on the contrary facts presented to it. *See* Pet. 8 n.3; *id.* at 20 n.8; *see also* note 7 *supra*. Specifically, the government asks this Court to ignore the court of appeals' conclusion that "Killingsworth provided copies of the new documents to an Assistant United States Attorney in 1993," Pet. App. 3a, and to do so based on the government's hearsay representation that the attorney "has since informed us that he did not see the documents in question until July, 1994." Pet. 20 n.8; *see also id.* at 8 n.3. This request is highly improper:

> Apart from the fact that the statement is unsworn, the statement itself is not in the record of the proceedings below and therefore could not have been considered by

> the trial court. *Manifestly, it cannot be properly considered by us in the disposition of the case.*

Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 n.16 (1970) (emphasis added; citation omitted); *see also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 278 n.5 (1986) (opinion of Powell, J.) (noting the "heretofore unquestioned rule that this Court decides cases based on the record before it").[11]

The government also asserts (*see* Pet. 20 n.8) that, even if it cannot now retract its representation that it had been aware of the evidence since 1993, the court nonetheless erred in criticizing it for "fail[ing] to conduct discovery between its receipt of such evidence in 1993 and the court's dismissal of the action in August 1994." Pet. App. 6a n.3. The government protests that it "could not have conducted formal discovery at a time when the case had been dismissed with prejudice and was pending on appeal in the Ninth Circuit." Pet. 21 n.8. This argument is completely irrelevant. The court of appeals' point was that the government failed to do *anything* to investigate the additional allegations. The government, of course, is no ordinary litigant, and has at its disposal powerful means for obtaining information that are not available to private parties. Nonetheless, the record shows that upon receiving the amended complaint in 1990, the government merely made a request to Killingsworth to provide any evidence in support of the additional charges, and then let the matter drop for four years when Killingsworth did not provide anything. *See* Clerk's Rec. 127 at 2 (Govt.'s Ex Parte Application for Continuance).[12] Thus, in holding that the government exhibited a lack of diligence in its handling of this case, the court of

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[11] The government's effort to overturn the court of appeals' holdings that were based on the 1993 date also comes much too late because the government failed to raise this point in its petition for rehearing below. Far from raising any objection, the government's petition again expressly conceded that Killingsworth had shown the "new" documents to an Assistant U.S. Attorney in 1993. Pet. for Rehearing, C.A. 94-56599 at 7.

[12] Indeed, the government apparently was willing to let the additional allegations be dismissed with prejudice, inasmuch as it made no effort to oppose Northrop's partial summary judgment motion. *See supra* at 3.

appeals reached the only possible conclusion on the record here.[13]

In any event, even assuming (contrary to the record) that the evidence was "newly discovered" and that the government was diligent in investigating the case, the government committed a further procedural default that makes it impossible to criticize the lower courts' reaffirmation of the settlement: despite numerous opportunities to do so, *the government never presented the alleged new documents to the district court.*[14] The district court and the court of appeals thus simply had no evidentiary basis on which to credit the government's assertions that the settlement undervalued the FCA claim, nor is there any such basis in the record before this Court.[15]

Yet another illustration of the government's mishandling of this case in the courts below is its conduct with respect to intervention. In 1992, the government could have avoided the issues presented here simply by filing a motion to intervene: as a party-litigant, the government then would have had abso-

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[13]The government unfairly suggests that Northrop improperly "withheld" the "new" documents from Killingsworth. Pet. 8. There is no basis in the record for this assertion, which was never accepted by the lower courts. On the contrary, Northrop properly complied with all of its discovery obligations in this case. The government fails to note that, shortly after Northrop filed its motion for summary adjudication with respect to the amended complaint's additional allegations, Killingsworth and Northrop agreed to settle the case, and discovery *was stayed* by the district court, pursuant to a stipulation with Killingsworth's counsel, while the government reviewed the settlement. *See* Clerk's Rec. 78.

[14]The government's petition does not (and cannot) expressly deny this fact. It does, however, repeatedly use language that might be misunderstood as suggesting otherwise. *See, e.g.*, Pet. 8 (government "inform[ed] the district court of the new evidence"); *id.* at 9 (new evidence was "proffered by the government"); *id.* at 19 (government "relied on that evidence" in challenging the settlement).

[15]The government's argument that the courts below erred in refusing to consider the "newly discovered evidence," Pet. 19-20, is thus unavailing. There simply was no such new evidence in the record to consider.

lute control over any settlement. *See Evans v. Jeff D.*, 475 U.S. 717, 726-27 (1986). Indeed, in order to break the impasse that then existed, Northrop specifically requested that the government move to intervene. Supp. E.R. 178. And at an April 1992 status conference, the district court ordered the government to file such a motion if it wished to object to the settlement. Pet. App. 13a. The government nonetheless steadfastly refused to intervene, even telling the court of appeals at oral argument in June 1993 that it would not intervene if the case were remanded. Supp. E.R. 7.

On remand, however, after the propriety of the settlement had been fully briefed and it was once again clear that the government's concerns were unfounded and that the settlement would be reaffirmed, the government reversed course and sought a continuance of the settlement hearing so that it might file a motion to intervene. But by the time the government was ready to get on board, the train had already left the station: the government presented its motion for filing two days *after* the settlement had already been approved, and the district court clerk's office refused to accept it. *See infra* at 28. Consequently, the court of appeals found that the motion "was never properly before the district court." Pet. App. 5a n.2. The government thus failed to make any use in this case of its right to request intervention — a right that ordinarily functions as the primary means by which the government is able to exercise ultimate control over the course of litigation conducted by relators in the name of the United States.

If, in future cases (unlike this one), the government has good grounds for contending that a settlement is against the public interest, it seems unlikely that the government will commit the same sort of repeated procedural blunders that characterized its handling of this case. Accordingly, if and when a case arises in which the government has made a good factual record and taken reasonable steps to block a *qui tam* settlement, but the settlement is nonetheless approved, then perhaps the statutory question will be well presented for review (assuming *arguendo* that the question of the govern-

ment's ability to veto *reasonable* settlements is deemed appropriate for review at all).

3. The Court of Appeals Correctly Concluded That the False Claims Act Does Not Grant the Government an Unconditional and Unreviewable Right to Veto a *Qui Tam* Settlement That Has Been Found by the Courts to be Fair, Adequate, and Reasonable

This Court should also deny review because the decision below is unassailably correct. Moreover, because the issues involved are complex, the lower courts should be allowed to develop further this novel area of the law unless and until resolution by this Court becomes necessary.

Section 3730(b)(1) provides:

> A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

31 U.S.C. § 3730(b)(1). The government argues that this language is "unambiguous" and "ought to have ended the court of appeals' inquiry" in the government's favor. Pet. 12. The government's simplistic position is inconsistent with basic canons of statutory construction.

As an initial matter, the government itself expressly concedes that the statutory language cannot be read with the literalism it urges upon this Court. In a footnote at the very end of its discussion of this issue, the government acknowledges that the Attorney General's consent is not required "[w]here a court dismisses a *qui tam* action on the merits." Pet. 18 n.7. But this concession is fatal to the government's position. The limitation that the government concedes (that its consent is not required for "merits" dismissals) is no more apparent from the supposedly "plain language" of the statute on which it relies than is the limitation that the government rejects (that the government may withhold its consent only

for "good cause"). The question in both cases is whether such a limitation is reasonably implied by the statutory language. For several reasons, the court of appeals' affirmative answer to that question is correct.

In resolving this question, the court of appeals properly looked to "the language and design of the statute as a whole," *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988), and correctly noted that the government's claim of an absolute right to veto a settlement was inconsistent with several other provisions of the statutory text. In particular, the court of appeals noted that the government's dismissal rights under § 3730(b)(1) must be read in light of the provisions of the FCA delineating the government's and the relator's respective rights following an initial declination of intervention by the government. Pet. App. 22a-24a.

After such a declination, the relator has the "right to conduct the action," 31 U.S.C. § 3730(b)(4)(B); *see also id.* § 3730(c)(3), and the court may "permit the Government to intervene" *only* "upon a showing of good cause," *id.* The court correctly concluded that the government's claim to an unconditional veto is "contradictory to the express language of § 3730(b)(4)(B), which gives the *qui tam* plaintiff 'the right to conduct the action' " — a right that "obviously includes the right to negotiate a settlement in that action." Pet. App. 24a. Moreover, the court properly held that objecting to a settlement and blocking a dismissal were a form of "interven[tion]" and were therefore covered by the "good cause" language of § 3730(c)(3).[16] Pet. App. 28a-29a. These provisions together make clear that the government may not block a settlement and dismissal absent good cause.[17]

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[16] Indeed, Northrop argued below that such a veto could be accomplished only by intervening as a proper party-litigant in the suit. The court of appeals rejected the latter conclusion, but agreed that the government's objection was nonetheless a form of intervention and was therefore subject to § 3730(c)(3)'s "good cause" requirement.

[17] By recognizing a governmental right to "limited intervention" to challenge a settlement (subject to a showing of "good cause" under

The government attacks this analysis by asserting that there is "no basis" for concluding that the phrase "right to conduct the action" includes the right to settle it. Pet. 16. That argument, however, is at odds with the plain meaning of the phrase. *See, e.g.*, Webster's Third New International Dictionary 474 (1966) (defining "conduct" as "to have the direction of: RUN, MANAGE, DIRECT"). More important, the government's argument is inconsistent with the language of § 3730(d)(2), which (in discussing the appropriate allocation of any recovery under the FCA) expressly recognizes that the relator has the right to "settl[e] the claim." *See* 31 U.S.C. § 3730(d)(2) (referring to the relator as "the person bringing the action or *settling the claim*") (emphasis added). Moreover, the right of a relator to settle a claim was expressly recognized in the House Report on the 1986 amendments to the FCA. *See* H.R. Rep. No. 660, 99th Cong., 2d Sess. 31 (1986) (noting that the relator may proceed with the action "to judgment or settlement").

The government also criticizes the court of appeals' conclusion that the consent provision of § 3730(b)(1) is operative only during the initial period during which the complaint remains under seal. Pet. 14-15. That conclusion, however, follows logically from the fact that the relator's right to "conduct the action" — a right that limits the government's power to block settlement and dismissal — simply does not arise until after the under-seal period has expired and the govern-

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§ 3730(c)(3)), the court of appeals' construction had the felicitous consequence of effectively according the government objection rights comparable to those provided to the relator under § 3730(c)(2)(B). Pet. App. 29a-30a. The government's description of the court of appeals' opinion mentions this resulting equivalence, *but fails to mention that the court of appeals' reasoning on this point was based on § 3730(c)(3)*. Pet. 7-8, 12 n.5. Indeed, if one were to read only the government's petition, one would be left with the mistaken impression that the court of appeals simply decided to take the provisions of § 3730(c)(2)(B) — which describe the relator's hearing rights — and apply them *mutatis mutandis* directly to the government.

ment has declined the case. *See* 31 U.S.C. § 3730(b)(4)(B), (c)(3).

The government protests that its power to block a dismissal under § 3730(b)(1) should be read to trump the relator's right to "conduct the action," and not vice versa, but there is no basis in the statutory language for the government's prioritization of these provisions. By contrast, there *is* textual support for the court of appeals' conclusion that nothing in § 3730(b)(1) limits the relator's right to settle a case. The predecessor to § 3730 that was in effect prior to the codification of Title 31 in 1982 did *not* state that the Attorney General's consent was necessary before a *qui tam* suit could be "dismissed"; rather, it said that, without such consent a suit could not be "withdrawn or discontinued." *See* 31 U.S.C. § 232(B) (1976 ed.). That language, which may properly be considered in construing the meaning of the current statute,[18] clearly suggests that § 3730(b)(1) applies "only to cases" in which a *qui tam* plaintiff "sought to withdraw an action *before the United States had [an] opportunity to assess its merits or intervene in its conduct.*" *Minotti v. Lensink*, 895 F.2d 100, 103 (2d Cir. 1990) (emphasis added).[19]

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[18] The change in language that occurred when Title 31 was codified was not intended to change the meaning of the provision. *See Minotti v. Lensink*, 895 F.2d 100, 103 (2d Cir. 1990). *See also Cass v. United States*, 417 U.S. 72, 82 (1974) (given that "the revisers expressly stated that changes in language resulting from the codification were to have no substantive effect," the clear meaning of predecessor statute was controlling in construing post-codification version).

[19] The government erroneously contends that this limitation renders § 3730(b)(1) "virtually meaningless," because "a voluntary dismissal made before service of the defendant's answer is without prejudice." Pet. 14-15 (citing Fed. R. Civ. P. 41(a)(1)). What Rule 41(a)(1) actually says is that "*[u]nless otherwise stated in the notice of dismissal or stipulation [for dismissal]*, the dismissal is without prejudice . . ." (emphasis added). Indeed, in this regard, Rule 41(a)(1) makes absolutely no distinction between a voluntary dismissal prior to service of an answer (which is accomplished by filing a "notice of dismissal") and a voluntary

In any event, even assuming that § 3730(b)(1) applies throughout the pendency of a *qui tam* lawsuit, the government's argument for an absolute veto still fails. The government overlooks an important aspect of the language of § 3730(b)(1) that flatly disproves its argument. The statutory text requires the consent of *both* "the [district] court and the Attorney General," and it has long been recognized that *district courts* themselves do not have the kind of unconditional and unreviewable authority that the Attorney General claims that this provision confers. On the contrary, it repeatedly has been held that, where the approval of a district court is necessary to effectuate a settlement and dismissal,[20] the district court may not disapprove the settlement without "sufficient reason." *See, e.g., Little Rock School Dist. v. Pulaski County Special School Dist.*, 921 F.2d 1371, 1393 (8th Cir. 1990) (reversing district court's refusal to approve settlement in desegregation case).[21] Because the term "consent" in § 3730(b)(1), when applied to the phrase "the court," must be understood as referring only to a conditional power to withhold consent for sufficient reason, that very same word,

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dismissal after service of an answer (which is accomplished by filing a stipulation).

[20] Ordinarily, dismissal or termination of a case pursuant to a settlement does not require the approval of the court, but is accomplished simply by filing with the court a stipulation signed by all parties. *See* Fed. R. Civ. P. 41(a)(1)(ii). Court approval is required, however, in certain cases, *e.g.*, if the case is a class action, if the settlement involves a consent decree, or if an applicable statute specifically requires court approval.

[21] *See also In re Smith*, 926 F.2d 1027, 1028-30 (11th Cir. 1991) (issuing writ of mandamus where district court relied on improper reasons in refusing to approve settlement in case under federal Education of the Handicapped Act); *Durrett v. Housing Auth. of the City of Providence*, 896 F.2d 600, 604-05 (1st Cir. 1990) (reversing district court's refusal to approve class action settlement in Fair Housing Act suit); *United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348, 351-52 (6th Cir. 1986) (reversing district court's refusal to approve settlement where district court "condition[ed] its approval of the consent decree upon amendment of the decree to allow a third party, who had not asserted an independent claim, to receive part of the settlement monies").

when applied to the phrase "the Attorney General," must be understood as connoting a comparable limitation on the Attorney General's power to withhold consent when the government declines to intervene. *See BankAmerica Corp. v. United States*, 462 U.S. 122, 129 (1983) ("[W]e reject as unreasonable the contention that Congress intended the phrase 'other than' to mean one thing when applied to 'banks' and another thing as applied to 'common carriers,' where the phrase 'other than' modifies both words in the same clause."). This textual analysis leads to exactly the same conclusion that the court of appeals reached — namely, that the government may not withhold its consent absent "good cause."[22]

Moreover, even if the government is correct that § 3730(b)(1) applies to all *voluntary* dismissals pursuant to a settlement, the court of appeals correctly held that this would be insufficient to provide the government the power it seeks. Pet. App. 24a-25a. The parties still could enter into a settlement (contingent, of course, on the suit ultimately being dismissed with prejudice) and the court still could approve it. The defendant then could move for involuntary dismissal for nonprosecution, and *that* dismissal would not require the government's consent. *See Minotti*, 895 F.2d at 103-04 (holding that government's consent is unnecessary where court dismisses *qui tam* suit as a sanction for failure to comply with discovery orders). The only way in which the government could avoid that dismissal would be by intervening — which would require a showing of "good cause" under 31 U.S.C. § 3730(c)(3). The end result would be the same: the government would have to show good cause before it could defeat a dismissal and settlement.[23]

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[22] Under this analysis, the court of appeals also was correct in its conclusion that, *prior* to the expiration of the under-seal period, the government has, effectively, an absolute right to block dismissal, because the government's need to make a timely initial decision whether to intervene always will constitute good cause for barring a dismissal.

[23] Indeed, a contrary conclusion also would lead to peculiar results by permitting the government to be both spectator and quarterback: while

For all of these reasons, the court of appeals correctly concluded that the government does not have an absolute and unreviewable right to veto the settlement and dismissal of a *qui tam* case in which it has not intervened.

B. Because the Government Never Made a Proper Motion to Intervene and the Lower Courts Never Ruled on Any Such Motion, Neither the Decisions Below Nor the Record Raise the Second Question Presented in the Petition — a Question That in Any Event Would Not Warrant This Court's Review

The second question presented by the petition is "[w]hether the court of appeals erred in refusing to allow the Attorney General to intervene to take over prosecution of [the] *qui tam* action . . . ." Pet. at (I). The record, however, makes clear that the government never made a proper motion to intervene in the district court and that, consequently, neither the district court nor the court of appeals ever ruled on such a motion. Because this question was never properly presented to the lower courts, this Court lacks jurisdiction to decide it. Review should be denied.

As the transcript of the August 22, 1994 hearing before the district court makes clear, the government never made a motion to intervene at that hearing. On the contrary, it merely informed the court that it *wanted to file* such a motion, and the only request that it made at the hearing was for a *continuance* "to allow the government to file that motion." E.R. 80-81. The district court, however, held that the request for additional time was not well taken, and ordered that the hearing on the settlement be held as scheduled. *Id.* at 87-88. After hearing argument on the propriety of the settlement, the court rejected the government's arguments and reaffirmed the settlement. *Id.* at 90-91.

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insisting on standing at the sidelines, the government could hold the case in limbo despite the parties' desire to stop litigating, and despite the court's conclusion that the settlement is entirely proper.

Two days *after* the hearing, the government belatedly attempted to file a motion to intervene, but the motion was rejected for filing by the district court clerk's office because the case had already been closed by virtue of the court's decision to reaffirm the settlement. Pet. App. 5a n.2. In apparent recognition of the fact that it had failed to secure a *judicial* ruling on its purported motion, the government took the unusual step of designating, in its notice of appeal, that it sought to appeal from "the return of the Government's Motion to Intervene by the Clerk of Court for the Central District of California which return was tantamount to a denial of the Government's motion." E.R. 114-15.

Tellingly, the government never asserted in the court of appeals that it had made a motion to intervene at the August 24 hearing. Rather, it conceded that it merely had informed the district court at the hearing that it "intended to file a motion to intervene" and noted that it requested a continuance of the hearing so that that motion could "be heard before a decision on the motion to reaffirm the settlement." U.S. Br., C.A. 94-56599 at 13.

In its petition in this Court, the government carefully refrains from directly contradicting any of the foregoing.[24] Indeed, rather than saying anything about the record before the

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[24]The petition does, however, use a number of sentences that, while literally true, might be misread to suggest that such a motion was made. Thus, for example, the petition asserts that at the hearing "government counsel informed the court that the government wished to intervene and take over the litigation," *but the petition never mentions that this comment was made in connection with a motion for a continuance, not a motion for intervention.* Pet. 9. And while the petition is literally correct in stating that the government at the hearing "asked that its request for intervention be heard and decided before the court ruled on the pending Northrop motion to reaffirm the settlement," *id.*, that comment must not be read to suggest that the government was merely discussing the scheduling of two *pending* motions. There was no pending motion to intervene; the whole point of the government's request at the hearing was that it wanted the hearing on Northrop's motion postponed so that it could file such a motion to intervene.

district court, the government relies on a sentence *in the court of appeals' opinion*, which shows, according to the government, that "[t]he court [of appeals] acknowledged that the government had sought to intervene early in the hearing and that the district court had declined to address that request." Pet. 20 n.8 (citing Pet. App. 5a n.2). The government's characterization, not of the record of the hearing, but of the court of appeals' description of that record, is irrelevant. Regardless of how the court of appeals described the proceedings in the district court, the record before the district court remains what it is, and that record simply does not contain such a motion to intervene.[25]

Because the government never presented a proper motion to intervene, it never obtained a ruling on such a request from the lower courts. Indeed, the court of appeals expressly stated that, because the motion was not properly filed, "we decline to address it for the first time on appeal." Pet. App. 5a n.2. Consequently, there is nothing for this Court to review.[26]

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[25] In any event, the government's argument is entirely inaccurate because the court of appeals did not in fact say that the government "had sought to intervene early in the hearing." Pet. 20 n.8. Rather, all that the court of appeals said was that the government "raised its motion for intervention before the district court." Pet. App. 5a n.2. That, quite obviously, was merely a reference to the fact that the government, in arguing for a continuance, expressed its intention to file such a motion in the future. Similarly, the court's comment that the "government did not attempt to resurrect the motion at some later point in the remand hearing" was a reference to the fact that, after the request for a continuance was denied, the government did not proceed to make a motion to intervene. *Id.*

[26] Moreover, even assuming (contrary to the record), that the question of intervention had been presented and adjudicated at the August 24 hearing, the presentation of that factbound issue here would be fatally complicated by many of the same procedural errors discussed above with respect to the first question presented. *See supra* at 16-20.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: September 16, 1996

Respectfully submitted,

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No. 96-123

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

NORTHROP CORPORATION AND MAX KILLINGSWORTH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WALTER DELLINGER
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

A. The False Claims Act (FCA or Act) provides that a *qui tam* action "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." 31 U.S.C. 3730(b)(1). In our petition for a writ of certiorari, we explain (Pet. 11-18) why Section 3730(b)(1) is properly construed to permit the Attorney General to veto the voluntary dismissal, pursuant to settlement, of a *qui tam* suit brought under the Act. We further explain (Pet. 21-22) that the decision of the court of appeals to the contrary will substantially impair the Attorney General's ability to protect the public interest in the just resolution of suits involving fraud against the United States, and that review by this Court is therefore warranted even in the absence of a circuit conflict.

Respondent Northrop does not contest the substantiality of the public and governmental interests involved.

Rather, Northrop contends that (1) those interests will be sufficiently protected by a rule allowing the district court to determine the reasonableness of a proposed *qui tam* settlement (Br. in Opp. 13-15), (2) the manner in which the government litigated this case in the lower courts makes it an unsuitable vehicle in which to resolve the question presented (*id.* at 16-21), and (3) the court of appeals' construction of Section 3730(b)(1) is correct (Br. in Opp. 21-27). Those arguments are unpersuasive.

1. Northrop contends (Br. in Opp. 13) that the court of appeals' decision will affect the outcome only of cases in which the government objects to a *qui tam* settlement "mistakenly, unreasonably or arbitrarily, or for an improper purpose." The government does not, of course, assert an interest in arbitrarily vetoing settlements that are fair and reasonable. The point instead is that the Attorney General and the district court, each acting in good faith, may disagree as to the reasonableness of a given settlement. When such disagreements occur, the Attorney General's ability to safeguard the interests of the United States will be substantially impaired if she is compelled to accept a settlement that she concludes is not in the public interest.

The United States, it should be emphasized, is hardly a bystander to *qui tam* litigation. A *qui tam* action is predicated on allegations of fraud against the United States, and the suit is brought "for the person [the relator] and for the United States Government." 31 U.S.C. 3730(b)(1). The government receives the bulk of any monetary recovery. 31 U.S.C. 3730(d)(1) and (2). Perhaps most important, if a dismissal order in a *qui tam* case incorporates a settlement agreement, the dismissal will generally bar the government from filing a subsequent suit alleging claims falling within the scope of the settlement. See Pet. 13-14 & n.6. Indeed, the district court in the instant case ex-

pressly ordered that the settlement be affirmed and that the suit "be dismissed in its entirety with prejudice as to both Killingsworth and the United States." Pet. App. 9a. Thus, even where the government declines to intervene to take over the prosecution of a *qui tam* action, it retains the type of direct and substantial interest in the ultimate disposition of the suit that is usually confined to the parties to litigation.

It is well established that "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party * * * without that party's agreement." *Firefighters* v. *Cleveland*, 478 U.S. 501, 529 (1986). That principle applies even where the settlement receives the imprimatur of the district court. See *ibid.* There is consequently nothing anomalous about the rule that *qui tam* litigation cannot be settled without the approval of the Attorney General. Rather, that rule reflects Congress's recognition that even without formal intervention, the government's stake in the litigation is sufficiently like that of a party that the suit should not be settled without its consent.[1]

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[1] Under Section 3730(b)(1), voluntary dismissal of a *qui tam* action requires the consent of both the Attorney General and the district court. The requirement that the district court give its consent to a *qui tam* dismissal, Northrop points out, "must be understood as referring only to a conditional power to withhold consent for sufficient reason." Br. in Opp. 25. Northrop contends (*id.* at 25-26) that the Attorney General's authority should be similarly constrained. That analogy is misplaced. Where the approval of a district court is required to effectuate a settlement, the court's refusal to approve the agreement is, as Northrop contends, subject to appellate review. We are aware of no authority, however, suggesting that a *litigant's* refusal to agree to a settlement may be overturned by a court. Cf. *Evans* v. *Jeff D.*, 475 U.S. 717, 726 (1986) ("[T]he power to approve or reject a settlement negotiated by the parties * * * does not authorize the court to require the parties to accept a settlement to which they have not agreed.").

2. Northrop also contends (Br. in Opp. 16) that this case is a "poor vehicle" for resolving the first question presented because "the government's inability to block the settlement in the lower courts was directly attributable to its own failure to substantiate its objections." Northrop argues (*id.* at 16-21) that the government failed promptly to investigate allegations of fraud or to seek leave to intervene in the lawsuit.

As we explain in Part B, *infra*, Northrop's allegations of dilatory behavior on the part of government counsel are unfounded. Even if Northrop's characterization of the record below were correct, however, it would have no bearing on the suitability of this case as a vehicle for determining the scope of the Attorney General's authority under Section 3730(b)(1). Northrop does not deny that the Attorney General asserted in a timely fashion her right to veto the proposed settlement. Nor does Northrop deny that acceptance of the government's construction of Section 3730(b)(1) would require reversal of the court of appeals' judgment. The thrust of Northrop's argument is that the government might have attained its objectives by alternative means, and thereby obviated the need to resolve the scope of the Attorney General's authority under Section 3730(b)(1). That contention is simply irrelevant: whatever alternative courses the Attorney General might have pursued, the question whether she was entitled to veto the proposed settlement and dismissal is squarely and cleanly presented in this case.[2]

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[2] Northrop's argument is, moreover, substantially circular. Northrop asserts, for example, that

> [y]et another illustration of the government's mishandling of this case in the courts below is its conduct with respect to intervention. In 1992, the government could have avoided the issue presented here simply by filing a motion to intervene: as a party-litigant,

The position of the United States is that it need not persuade the district court that its objections to a proposed *qui tam* settlement are well-founded. Northrop argues to the contrary. But the allegation that the government "fail[ed] to substantiate its objections" to the settlement (Br. in Opp. 16) is simply irrelevant to the question whether the government is required to substantiate its objections in the first place.

3. Northrop's principal argument on the merits (see Br. in Opp. 22) is that the government's attempt to object to a *qui tam* settlement is a form of "intervention" and therefore requires a showing of "good cause." See 31 U.S.C. 3730(c)(3) (after the initial 60-day period plus any extensions of time have expired, the district court may "permit the Government to intervene at a later date upon a showing of good cause"). As we explain in the petition, however, the government's authority to veto the voluntary dismissal of a *qui tam* action substantially predates the

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the government then would have had absolute control over any settlement.

Br. in Opp. 19-20. Whether the failure to intervene constitutes "mishandling" of the case, however, depends on whether Section 3730(b)(1) authorizes the Attorney General to veto a proposed settlement without assuming the substantial burdens (such as increased discovery obligations, attendance at hearings and conferences, and the filing of additional pleadings) that intervention would entail. See Pet. 22. The government's position, after all, is that the Attorney General need *not* intervene in order to prevent the relator and defendant from executing a settlement that disserves the public interest. If our interpretation of Section 3730(b)(1) is correct, then intervention would have been a wasteful and unduly cumbersome means of preventing effectuation of the settlement in this case. Northrop is of course entitled to assert the contrary view; but the fact that the government litigated the case in a manner consistent with its own understanding of the Act hardly renders this case an unsuitable vehicle for resolution of the question presented.

statutory provisions permitting intervention by the government. See Pet. 15.[3] There is consequently no basis for Northrop's contention that the Attorney General's power to block dismissal of a *qui tam* action is subject to the "good cause" requirement of Section 3730(c)(3).

We acknowledge in our certiorari petition that "[w]here a court dismisses a *qui tam* action on the merits, * * * Congress did not intend to require the Attorney General's consent." Pet. 18 n.7. Northrop contends (Br. in Opp. 21) that "this concession is fatal to the government's position," because it demonstrates that strict fidelity to the language of Section 3730(b)(1) is not feasible in the full range of cases falling within its literal coverage. No

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[3] As the court of appeals acknowledged, "[t]he language in the statute requiring both the government and the court to consent to a dismissal came from the initial *qui tam* statute of 1863." Pet. App. 23a; see Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. The False Claims Act was amended in 1943 to permit intervention by the government within the 60-day period after a *qui tam* suit is filed. See Act of Dec. 23, 1943, ch. 377, 57 Stat. 608. Section 3730(c)(3), which permits intervention by the government after the initial 60-day period upon a showing of good cause, was added to the Act in 1986. Act of Oct. 27, 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3156.

Prior to the 1982 recodification of the FCA, the Act provided that a *qui tam* suit "shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the United States attorney, first filed in the case, setting forth their reasons for such consent." 31 U.S.C. 232(B) (1976). Northrop contends that the earlier language "clearly suggests that § 3730(b)(1) applies only to cases in which a *qui tam* plaintiff sought to withdraw an action before the United States had an opportunity to assess its merits or intervene in its conduct." Br. in Opp. 24 (internal quotation marks, italics, and brackets omitted). We see nothing in the text of former Section 232(B) that would suggest such a temporal limitation. As noted above, moreover, the provision requiring the government's consent to the "withdraw[al]" or "discontinu[ance]" of a *qui tam* action was enacted well before the government was first permitted to intervene in such a suit.

canon of construction suggests, however, that the plain language of a statutory provision should be ignored altogether simply because its application in a particular instance would be unworkable. To require the consent of the Attorney General to a merits dismissal of a *qui tam* suit would be absurd. It would likely be unconstitutional as well, since such a provision would authorize the Attorney General to perform what is in substance a judicial act. To require the Attorney General's consent to the settlement and voluntary dismissal of such an action, by contrast, is constitutionally unproblematic, and it is fully consistent with the established rule that a litigant's claims may not be settled without the litigant's consent. See pages 2-3, *supra*. There is therefore no justification for departing from the plain language of the Act when applying Section 3730(b)(1) to voluntary dismissals.[4]

B. After the court of appeals' remand in *Killingsworth I*, Northrop moved to reaffirm the settlement. The government filed a written opposition to Northrop's motion. At the hearing on that motion, government counsel informed the district court that the government wished to intervene to take over the conduct of the litigation. See 94-56599 C.A. E.R. 80-81, 83-84, 88. Counsel explained that the government had recently obtained what

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[4] As noted above (see note 3, *supra*), prior to its 1982 recodification the FCA provided that a *qui tam* suit "shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the United States attorney, first filed in the case, setting forth their reasons for such consent." 31 U.S.C. 232(B) (1976). The words "withdrawn" and "discontinued" would cover voluntary dismissal pursuant to settlement, but would not encompass dismissal by the district court after an adjudication on the merits. As Northrop acknowledges (see Br. in Opp. 24 & n.18), the wording changes made in the 1982 recodification were not intended to change the meaning of the relevant provision.

it believed to be evidence of fraud substantially greater than had originally been supposed, and he contended that the new evidence furnished "good cause under the statute to intervene" after expiration of the initial 60-day period. *Id.* at 84; see 31 U.S.C. 3730(c)(3). The district court stated that it would first determine whether the government had established good cause for objecting to the settlement, and that the propriety of intervention would become an issue only if the government's objections to the settlement were found to have merit. 94-56599 C.A. E.R. 84. The court ultimately reaffirmed the settlement over the government's objection. Both in its remarks at the hearing and in its subsequent written order, the court made clear that it deemed the presence or absence of new evidence to be irrelevant. The pertinent inquiry, in the court's view, was whether the settlement was fair and reasonable in light of the evidence that was available to the parties at the time it was negotiated. See *id.* at 90-91; Pet. App. 8a.

Thus, contrary to Northrop's suggestion (see Br. in Opp. 27-29), the district court's refusal to consider the government's intervention request had nothing whatever to do with the timing of the government's written motion to intervene.[5] Rather, the court concluded that (1) the propriety of intervention would become an issue only if the settlement were deemed unreasonable, and (2) in determining the reasonableness of the settlement, any evidence that was not available at the time the agreement was originally negotiated should be ignored. The court of appeals approved that reasoning, explaining that the man-

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[5] That motion was submitted to the district court on August 24, 1994—two days after the hearing on Northrop's motion to reaffirm the settlement, and approximately two weeks before the court issued its written order granting that motion. See Pet. App. 5a.

date in *Killingsworth I* "merely required the district court to hold a hearing on whether the government's objections to the proposed settlement rested on good cause —i.e., whether Killingsworth and Northrop colluded to shift the majority of the settlement funds to Killingsworth's personal claim and attorney's fees—thereby depriving the government of its fair share." Pet. App. 5a. The court of appeals stated that "[t]he district court did not err by refusing to consider the alleged new evidence relating to other issues before determining whether the government had good cause for objecting to the proposed settlement." *Id.* at 6a.[6]

As we explain in the petition (see Pet. 19), that holding is fundamentally flawed. The discovery of new evidence of fraud is the paradigmatic "good cause" for intervention by the government, pursuant to 31 U.S.C. 3730(c)(3), after expiration of the initial 60-day period. See S. Rep. No. 345, 99th Cong., 2d Sess. 26-27 (1986). Indeed, Northrop makes no effort to argue that a timely request for intervention could properly be denied without consideration of newly discovered evidence. It contends instead that the issue was not properly presented to the lower courts because

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[6] There is also no basis for Northrop's suggestion (Pet. 19) that the lower courts' disposition of this case was affected by the government's failure actually to present the new documentary evidence to the district court. The government made what was in essence an offer of proof, representing to the district court that the new documents furnished evidence of substantially greater fraud than had previously been alleged. The district court made clear, however, that it had no interest in considering those documents: it regarded the evidence as irrelevant because it had not been available at the time the settlement was originally negotiated. See 94-56599 C.A. E.R. 90-91; Pet. App. 8a. The court of appeals approved that reasoning, stating that "[t]he district court did not err by refusing to consider the alleged new evidence." *Id.* at 6a.

the government failed to submit a written motion for intervention before the hearing on Northrop's motion to reaffirm the settlement.[7] The record makes clear, however, that the absence of such a written motion played no part in the district court's decision.

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[7] Relying on the court of appeals' assertion that "Killingsworth provided copies of the new documents to an Assistant United States Attorney in 1993" (Pet. App. 3a), Northrop also suggests (Br. in Opp. 17-18) that the pertinent evidence was not in fact new. Issues concerning the timing and circumstances of the government's receipt of the evidence, however, have nothing to do with the basis on which the district court resolved the case. The court did not suggest that the government had failed to exercise due diligence in investigating allegations of additional fraud; it held that the evidence was irrelevant because it postdated the negotiation of the settlement. See pages 7-9 and note 6, *supra*.

The court of appeals' statement quoted above, moreover, has no support in the record. In our brief in the court of appeals, we stated that "Killingsworth initially showed the new documents to an Assistant United States Attorney in 1993, but did not at that time provide copies to anyone within the Department of Justice." 94-56599 U.S. C.A. Br. 11. Our reply brief explained that government attorneys "merely had a brief look at the documents with no opportunity to engage in a careful analysis of them, much less to consult with FBI investigators and other witnesses to determine their importance." 94-56599 U.S. C.A. Reply Br. 9. Nothing in the record before the district court or the court of appeals suggested that the government had been provided with copies of the relevant documents in 1993.

Northrop criticizes (Br. in Opp. 9-10 n.7, 17-18) our representation (see Pet. 8 n.3, 20 n.8) that the Assistant United States Attorney has informed us that he did not see the documents in question until July 1994. The government may well be bound by its earlier representations to the court of appeals. We assuredly are not bound, however, by the court of appeals' assertion that the government received *copies* of the documents at that time—a statement that is entirely devoid of record support. And there is nothing "improper" (Br. in Opp. 17) about apprising this Court of information in conflict with the government's prior representations.

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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